TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 232.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN H. ALLISON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED FEBRUARY 1, 1902.

(18,392.)

(18,392.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 232.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN H. ALLISON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

	Original.	Prin.
Petition for writ of error	1	1
Allowance of writ of error	3	2
Writ of error	4	3
Bond on writ of error	6	4
Citation and service	7	5
Transcript from superior court	8	5
Summons	8	5
Complaint	8	6
Answer	10	7
Judgment	11	8
Petition to sue *in forma pauperis*	11	9
Certificate of counsel	11	9
Order granting leave to sue *in forma pauperis*	11	9
Undertaking on appeal	11	9
Proceedings in United States circuit court	12	10
Petition for removal	12	10
Affidavit for removal	13	11
Bond for removal	14	12
Order for removal	15	13
Clerk's certificate	16	14
Case on appeal	17	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 12, 1902.

	Original.	Print
Order refusing removal	17	14
Issues and verdict	18	15
Assignment of errors	18	15
Judge's certificate to case on appeal	18	15
Clerk's certificate to transcript of record	18	16
Docket entries	18	16
Opinion by Montgomery, J	19	16
Opinion by Furches, C. J	25	20
Judgment	27	21
Agreement as to record	28	22
Clerk's certificate	28	22

1 *Petition for Writ of Error to the Supreme Court of the United States.*

In the Supreme Court of North Carolina.

JOHN H. ALLISON, Plaintiff,
against
THE SOUTHERN RAILWAY CO., Defendant. } No. 473.

To be styled The Southern Railway Company, plaintiff in error, against John H. Allison, defendant in error.

To the Honorable David M. Furches, chief justice of the supreme court of North Carolina:

The petition of the Southern Railway Company respectfully showeth that it is the defendant, and plaintiff in error, in the above-entitled action, wherein J. H. Allison is the plaintiff, and defendant in error, and as such defendant it appealed from a judgment rendered against it in the superior court of McDowell county, at October term, 1901, for two thousand ($2,000) dollars and costs; that in the said action defendant Southern Railway Company, your petitioner, on June 25, 1901, submitted to his honor James E. Boyd, United States judge, sitting as a judge of the United States circuit court for the western district of North Carolina, in which district the county of McDowell is situate, a petition for the removal of said suit or civil action of J. H. Allison against The Southern Railway Company to the circuit court of the United States for the western district of North Carolina upon the ground of local prejudice; that such petition was presented in due form and was supported by sufficient affidavits as required by law, and that the bond required was filed; that on the 25th day of June, 1901, the said James E. Boyd, United States judge duly adjudged that the said defendant, your petitioner, on account of prejudice and local influence, could not obtain justice in the superior court of McDowell county, nor in any other court to which the defendant might, under the laws of the said State, have the right on account of said prejudice and local influence to
2 remove the same, and ordered the removal of the said cause and directed the clerk of the superior court in the county of McDowell to certify the said civil action to the said United States circuit court for the western district of North Carolina; that the said petition, affidavit, bond and order of removal were duly certified to the superior court of McDowell county, and at August term, 1901 of the said superior court the defendant moved that the said court should proceed no further in the said action and that the case should be dismissed. This motion was at the said August term, 1901, overruled, and an order made by the judge holding said court, which appears in the record herewith submitted, that the said State court declined to surrender jurisdiction of the said cause and that the said defendent was not entitled to remove the cause to the Federal court. Thereafter, to wit, at October term, 1901, the defend-

ant again moved to dismiss the cause or to continue the same, and the same was refused and the case was tried as appears in said record; that in said cause at the October term, 1901, a verdict was rendered against the said defendant and judgment rendered therein that the plaintiff have and recover of the defendant the sum of two thousand dollars and the costs of this action. That the defendant moved for a new trial and excepted to the said judgment, and the motion being refused and the exceptions being overruled, appealed in open court to the supreme court of North Carolina. That upon the said appeal the defendant, among other errors, assigned the following: The refusal of the said superior court to dismiss the cause, because the same had been regularly removed to the Federal court as provided by law.

That the said appeal came duly to be argued in the said supreme court of North Carolina, and on the — day of December, 1901, an opinion was filed in the said cause by the said supreme court of North Carolina, which is the highest court of law and equity of the said State, in which a decision could be had in the said suit, affirming the said judgment of the said superior court of McDowell county and deciding against the title, right, privilege and exemption set up and claimed under a construction of a statute of the United States, to wit, the statute authorizing the re-
3 moval of causes from the courts of the State to the circuit courts of the United States by the said Southern Railway Company, your petitioner, all of which will fully and at large appear by the record in said cause and the opinion of the supreme court of North Carolina filed in this behalf, which are hereby referred to and made a part of this petition. And under and by virtue of the Constitution and laws of the United States the defendant, your petitioner, is entitled to a writ of error issuing from the Supreme Court of the United States, directed to the chief justice and associate justices of the supreme court of North Carolina, directing the record and proceedings therein to be certified and sent to the Supreme Court of the United States in order that the error, if any there be, may be corrected.

Your petitioner further asks that the said writ of error be allowed by your honor, and that the bond herewith filed be approved, and that the clerk of the said supreme court of North Carolina be directed to certify the said record to the said Supreme Court of the United States and to do any and all things proper to be done in this behalf.

F. H. BUSBEE,
Attorney for the Southern Railway Company.

Sworn to and subscribed before me this the 24 day of December, 1901, — F. H. Busbee.

[L. S.] H. E. LITCHFORD,
Notary Public.

(Endorsed:) "The within petition is granted and writ of error allowed. David M. Furches, chief justice supreme court of North Carolina." "Filed Jan'y 8, 1902 in the supreme court of N. C."

4 *Writ of Error to the Supreme Court of North Carolina.*

In the Supreme Court of the United States.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
J. H. ALLISON, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the chief justice and associate justices of the supreme court of North Carolina, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of North Carolina before you, being the highest court of law or equity in the said State, in which a decision can be had in the suit between J. H. Allison, the plaintiff, and The Southern Railway Company, defendant, wherein was drawn in question the validity of an authority exercised under a statute of the United States, and the decision was against its validity, and wherein was drawn in question the validity of a statute of, or of an authority exercised under a statute of said State on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of its validity, and wherein was drawn in question the construction of a statute of the United States and the decision was against the right, title, privilege and exemption specially set up or claimed by the Southern Railway Company under such statute, a manifest error hath happened to the great damage of the said Southern Railway Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings therein, with all things concerning the same,
5 to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the — day of —— next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct the error, what, according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 4th day of January, in the year of our Lord one thousand nine hundred and two.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK,
Clerk U. S. Circuit Court, E. D. N. C.

Allowed by
DAVID M. FURCHES,
Chief Justice Supreme Court of North Carolina.

[Endorsed:] Original. Southern Railway Co., plaintiff in error, *vs.* J. H. Allison, defendant in error. Writ of error. Filed Jan'y 8, 1902 in the supreme court of N. C.

6 (Title of Cause.)

Know all men by these presents, that we, Southern Railway Company, a corporation, and A. B. Andrews, a citizen and resident of the State of North Carolina, are held and firmly bound into the above-named J. H. Allison, defendant in error, in the sum of four thousand dollars, for the payment of which well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents. Signed, sealed and dated the — day of December, 1901.

Whereas the above-bounden Southern Railway Company has sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of North Carolina, affirming the judgment for two thousand dollars and costs theretofore rendered by the superior court of McDowell county, North Carolina,

Now therefore the condition of this obligation is such that if the above-named Southern Railway Company prosecute said writ of error to effect and answer and pay all damages and costs in the Supreme Court of the United States and all other courts and discharge said judgment in full, if it fail to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

SOUTHERN RAILWAY COMPANY, [SEAL.]
By F. H. BUSBEE, *Attorney.*
A. B. ANDREWS, [SEAL.]

A. B. Andrews, being duly sworn, saith that he is worth double the amount specified in the above bond, above all debts, liabilities and exemptions allowed by law.

A. B. ANDREWS.

Sworn to and subscribed before me this 24 day of December, 1901.
[L. S.] W. T. SMITH, *N. P.*

Approved:
DAVID M. FURCHES,
Chief Justice Supreme Court of North Carolina.

Endorsed: "Filed Jan'y 8, 1902 in the supreme court of N. C."

7 UNITED STATES OF AMERICA:

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
J. H. ALLISON, Defendant in Error. } Citation.

Upon writ of error from the supreme court of North Carolina.

To J. H. Allison, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of North Carolina, wherein The Southern Railway Company is plaintiff in error and you are defendant in error, to show cause if any there be why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, shall not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of January, in the year of our Lord one thousand nine hundred and two.

DAVID M. FURCHES,
Chief Justice of the Supreme Court of North Carolina.

[Endorsed:] Original. Southern Railway Co. pl't'ff in error v. J. H. Allison, def't in error. Citation. Service of the within citation, of the petition for writ of error, of the writ of error and of the supersedeas bond, all by copy, is admitted this the 11 day of January A. D. 1902. Justice & Pless, attorney- for J. H. Allison pl't'ff & def't in error. Filed in the supreme court of North Carolina, January 17, 1902.

8 *Summons for Relief.*

McDOWELL COUNTY:

In the Superior Court.

J. H. ALLISON
against
THE SOUTHERN RAILWAY COMPANY.

The State of North Carolina to the sheriff of McDowell county, Greeting:

You are hereby commanded to summon The Southern Railway Company, the defendant above named, if it be found within your county, to be and appear before the judge of our superior court, at a court to be held for the county of McDowell, at the court-house in Marion, N. C., on the fourteenth Monday after the first Monday of January, it being the 15th day of April, 1901, and answer the complaint, which will be deposited in the office of the clerk of the superior court of said county, within the first three days of said term;

and let the said defendant take notice, that if it fail to answer the said complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 10th day of December, 1901.

THOMAS MORRIS,
Clerk Superior Court.

(Title of Cause.)

Complaint.

The plaintiff, complaining of the defendant, alleges:

I. That the defendant, Southern Railway Company, is, and was at the time hereinafter mentioned, a domestic corporation in the State of North Carolina, and owning and operating a line of railroad and doing the business of a common carrier of freight and passengers in said State and in the county of McDowell.

II. The plaintiff was, on and prior to the — day of ——, 1900, an employee of the defendant company, holding the position and performing the duties of section hand on the defendant's road, on a section thereof which extends through and east of the town of Old Fort, N. C.

III. That it was the duty of said plaintiff, as such employee, to work under the direction and control and obey the orders of the section master on said section, and the plaintiff was subject to be discharged by said section master, who was a vice-principal of the defendant company, if he failed to obey the orders and directions which were given him by the said vice-principal.

IV. That on the — day of ——, 1900, the plaintiff and the other section hands at work on the said section, were directed by said foreman or boss to place a hand car on the track of the defendant company and go thereon with the said foreman to the town of Old Fort,
9 N. C., and while endeavoring to carry out the said order the car on which the plaintiff was riding was struck by an eastbound freight train and the plaintiff was seriously injured, by having his leg and arm broken, and it became necessary, by reason of said injury, to have his arm amputated, and the plaintiff was otherwise seriously and permanently injured, to his great damage.

V. That the collision between the said freight and hand car was on a double or "S" curve, and at a point on the defendant's road where the plaintiff and those persons on the hand car with him could not see the approaching freight train until it was within seventy yards of them, and owing to the noise of the hand car the said freight train could not be heard until it was within sight, and said freight train was running behind its schedule time and at a speed of thirty miles an hour.

VI. That the said vice-principal and section boss, under whom plaintiff was working, knew and it was a part of his duty to know, the schedule time of all trains passing over said section, and it was the duty of said foreman, when passing over said section with a

hand car, at a time when a train was due, to keep a flagman out between the hand car and such train, so that a signal could be given in time to remove the hand car from the track before the train approached, or stop the train until the hand car could be removed.

VII. That the section master, on the day the plaintiff was injured as above alleged, was carelessly, negligently, and in disregard to his duty, was requiring the plaintiff and those working with him to pass over the track in the manner above alleged, without providing a flagman or taking other precautions to avoid a collision with said overdue freight train.

VIII. That plaintiff had not been apprised of his danger or the fact that said train was immediately expected, and was obeying the order of his superior or boss, and relying on him, as it was his duty to do; and after the said freight train came in sight and was discovered by plaintiff, or could have been discovered, it was only six seconds until the plaintiff was injured, as alleged and the plaintiff was, because of his great jeopardy and sudden fright, and his apprehension for himself and those on the hand car and freight train, so frightened that he could not, for the moment, act with the degree of prudence that would have otherwise characterized him.

IX. That the sudden peril in which the plaintiff was so placed, and his consequent and necessary excitement and incapacity for the moment to act with his usual prudence, was without fault on his part, but was wholly due to the negligence and carelessness and wrongful conduct on the part of the said section master and boss, as above alleged.

X. That at the time plaintiff was injured, as alleged, he was endeavoring to obey the immediate directions of the said section master.

XI. That without any fault on his part, but wholly by reason of the negligence and wrongful conduct of the defendant company, the plaintiff was so injured, caused great physical pain and anguish and mental suffering and loss of time and outlay of money, and his capacity to labor is greatly impaired and almost entirely destroyed by reason of his injuries, above alleged, to his great damage, to wit, in the sum of $6,000.

Wherefore, plaintiff prays judgment against the defendant for the sum of $6,000 damages, for the cost of this action, and for such other and further relief as to the court may seem just and proper.

JUSTICE & PLESS,
Attorneys for Plaintiff.

10 (Title of Cause.)

Answer.

The defendant, answering the complaint in this cause, says:

1. That the allegations contained in the first paragraph are not true, and they are denied. Further answering the allegations contained in the said paragraph, defendant says that it is a corporation duly created and organized under the laws of the State of Virginia, and was at the time mentioned in the complaint.

2. That the allegations contained in the second paragraph are true.

3. That the allegations contained in the third paragraph are not true, and they are denied.

4. That the allegations contained in the fourth paragraph are true.

5. That the allegations contained in the fifth paragraph are not true, and they are denied.

6. That the allegations contained in the sixth paragraph are not true, and they are denied.

7. That the allegations contained in the seventh paragraph are not true, and they are denied.

8. That the allegations contained in the eighth paragraph are not true, and they are denied.

9. That the allegations contained in the ninth paragraph are not true, and they are denied.

10. That the allegations contained in the tenth paragraph are not true, and they are denied.

11. That the allegations contained in the eleventh paragraph are not true, and they are denied.

12. That the allegations contained in the twelfth paragraph are not true, and they are denied.

13. And for a further answer and defense to said action, defendant says, that plaintiff contributed to his injury by his own negligence, by attempting to cross the track immediately in front of a moving train, which he saw, or could by reasonable diligence have seen, was approaching.

Wherefore, defendant demands that it go without day and recover its costs.

CHAS. PRICE,
J. L. C. BIRD,
G. F. BASON,
Counsel for Defendant.

NORTH CAROLINA, }
Wake County. }

A. B. Andrews, being duly sworn, says that he is an officer of the defendant, Southern Railway Company, to wit, the first vice-president thereof, that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

A. B. ANDREWS.

Sworn to and subscribed before me, this the 24th day of June, 1901.
H. W. MILLER, *N. P.*

11 (Title of Cause.)

Judgment.

This cause coming on to be heard before his honor M. H. Justice, judge, and a jury, and the issues having been answered in favor of

plaintiff: It is, therefore, considered and adjudged that the plaintiff have and recover of the defendant the sum of $2,000, and the costs of this action, to be taxed by the clerk.

October 26, 1901.

M. H. JUSTICE,
Judge Presiding.

(Title of Cause.)

Petition to Sue in Forma Pauperis.

NORTH CAROLINA,
McDowell County.

J. H. Allison, being sworn, says that he is unable to give the security or make the deposit required by law to enable him to prosecute the above-entitled action against the defendant, The Southern Railway Company, and therefore asks that he be allowed to sue in the said action as a pauper.

his
J. H. x ALLISON.
mark

Witness:
THOMAS MORRIS.

Sworn to before me, this the 30th day of November, 1900.

THOMAS MORRIS,
Clerk Superior Court.

This is to certify that we have examined the case above stated, between J. H. Allison, plaintiff, and The Southern Railway Company, defendants, and we believe that the said plaintiff has a good and meritorious cause of action against the defendant in both law and fact.

This November 30, 1900.

JUSTICE & PLESS, *Attorneys.*

In the above-entitled action, upon the certificate and affidavit above set forth, it is ordered that the said J. H. Allison be allowed to sue and prosecute this action as a pauper.

This November 30, 1900.

THOMAS MORRIS,
Clerk Superior Court.

Undertaking on Appeal.

12 Whereas, on the 21st day of October, 1901, the plaintiff recovered judgment against the defendant in the superior court of McDowell county for the sum of $2,000.

And whereas, the defendant, Southern Railway Company, has appealed therefrom to the supreme court of North Carolina:

Now, therefore, we, Southern Railway Company, and A. B. Andrews, of the county of Wake and State of North Carolina, under-

take, in the sum of $50, that the said Southern Railway Company shall pay all cost that may be awarded against it on such an appeal.

SOUTHERN RAILWAY COMPANY,
By G. F. BASON, *Attorney.*
A. B. ANDREWS. [SEAL].

NORTH CAROLINA, }
Wake County. }

On this, the — day of November, 1901, before me personally appeared A. B. Andrews, to me known to be the person who executed the foregoing bond, and personally acknowledged that he did execute the same.

And the said A. B. Andrews, being duly sworn, says that he is a resident and freeholder, worth doubly the amount of the foregoing bond, exclusive of property exempt from execution and over and above all liabilities.

A. B. ANDREWS.

Sworn to and subscribed before me, this the 6th day of November, 1901.

W. T. SMITH,
Notary Public.

Petition to Remove this Cause from the State Court to the Circuit Court of the United States.

In the Circuit Court of the United States for the Western District of North Carolina.

J. H. ALLISON
against
SOUTHERN RAILWAY COMPANY.

To the honorable the judges of the circuit court of the United States for the western district of North Carolina:

Your petitioner, The Southern Railway Company, respectfully shows that it is the defendant in the above-entitled suit or action, which has not been tried, and has not stood for trial at any term of the State court in which it was brought, but is now pending for trial in the superior court of the State of North Carolina for the county of McDowell, and that it desires to remove the same into the circuit — of the United States for the western district of North Carolina.

Your petitioner further states, that in the above-mentioned suit there is a controversy between a citizen of the State in which the said suit is brought and a citizen of another State, to wit, a controversy between your said petitioner, who avers that it is a corporation duly created and organized under the laws of the State of Virginia, and is not a resident of this State; that it was, at the commencement of this suit, and still is a citizen of the State of Virginia, and the said J. H. Allison, the plaintiff, who, your petitioner avers, was, at the commencement of this suit, and still is a citizen of the

State of North Carolina, in which said State said suit or action
13 was brought, and that both the said J. H. Allison and your petitioner are actually interested in said controversy.

Your petitioner further states, that it has filed herewith an affidavit, that it may be made to appear to the said circuit court that from prejudice and local influence your petitioner will not be able to obtain justice in the said State court, or in any other State court to which your petitioner may, under the laws of this State, have the right, on account of such prejudice and local influence, to remove said cause.

That said suit is brought for the purpose of recovering $6,000 damage for personal injuries alleged to have been caused by the negligence of the defendant, your petitioner, and that the said sum of $6,000 is demanded in the complaint.

Your petitioner therefore prays that the said affidavit may be accepted as good and sufficient, and that the said suit or action may be removed into said circuit court of the United States for the western district of North Carolina aforesaid, and to the end that the said removal may be perfected that such order be made in the premises as the nature of the case may require.

SOUTHERN RAILWAY COMPANY,
By G. F. BASON, *Attorney.*

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

I, G. F. Bason, being duly sworn, do say that I am one of the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof; and that the statements and allegations contained therein are true, as I verily believe.

G. F. BASON.

Sworn to and subscribed before me, this 20th June, 1901.
THOS. W. ALEXANDER, *Notary.*

[Seal of said Notary Public.]

Affidavit of G. F. Bason.

Circuit Court of the United States, the Western District of North Carolina.

(Title of Cause.)

I, G. F. Bason, being duly sworn, do say: that I am one of the attorneys for The Southern Railway Company, defendant in the above-named cause; that I have reason to believe, and do believe, that from prejudice and local influence, the said defendant, Southern Railway Company, will not be able to obtain justice in the superior court in the county of McDowell, State of North Carolina, where the said cause is now pending, nor in any other State court to which the said defendant may, under the laws of the said State, have the right,

on account of such prejudice and local influence, to remove said cause; that the grounds for such belief are, that this affiant has tried many suits against the Southern Railway Company and its predecessors in the superior court of the said county of McDowell, and in every instance where said cause or causes have been submitted to a jury the verdict has been against the said railroad company, without regard to weight of evidence.

Affiant further says that such prejudice exists not only in
14 the county of McDowell, but in any county to which the defendant may, under the laws of North Carolina, have a right to remove said cause.

G. F. BASON.

Sworn to and subscribed before me this the 20th day of June, 1901.

THOS. W. ALEXANDER, *Notary.*

[Seal of said Notary Public.]

Bond for the Removal of this Cause to the United States Circuit Court for the Western District of North Carolina.

Circuit Court of the United States for the Western District of North Carolina.

(Title of Cause.)

Know all men by these presents, that the Southern Railway, as principal, and A. B. Andrews, of Wake county, North Carolina, as surety, are held and firmly bound unto J. H. Allison and all other persons whom it may concern, in the penal sum of $500, for the payment of which, well and truly to be made, we bind ourselves, our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Southern Railway Company, having petitioned the circuit court of the United States for the western district of North Carolina for the removal of a certain cause pending in the superior court of McDowell county, in the State of North Carolina, wherein J. H. Allison is plaintiff and The Southern Railway Company is defendant, to the circuit court of the United States, in and for the western district of North Carolina:

Now, therefore, if The Southern Railway Company, the petitioner, shall enter into the said circuit court of the United States on the first day of its next session, a copy of the said suit, and shall well and truly pay all costs that may be awarded by the said circuit court of the United States, if the said court shall hold that this suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals, this — day of June, 1901.

SOUTHERN RAILWAY COMPANY,
By G. F. BASON, *Attorney.*
A. B. ANDREWS. [SEAL.]

Bond for removal.

STATE OF NORTH CAROLINA, }
County of Wake. }

I, A. B. Andrews, of said county of Wake and State of North Carolina, the surety named in the foregoing bond, being duly sworn, depose and say: That I am a resident of the State of North Carolina, and a property-holder therein; and that I am worth the sum of $500 over and above all my debts and liabilities, and exclusive of property exempt by law from execution, and that I have property in said State of North Carolina liable to execution of the value of more than five hundred dollars.

A. B. ANDREWS.

Sworn to and subscribed before me, this 24th day of June, 1901.

[Seal of said Notary Public.]

H. W. MILLER,
Notary Public.

15 *Order of Removal of this Cause to the Circuit Court of the United States for the Western District of North Carolina.*

In the Circuit Court of the United States for the Western District of North Carolina.

(Title of Cause.)

This cause coming on to be heard, upon the complaint and answer, and the petition, affidavit and bond filed herein by the defendant, Southern Railway Company, under the provisions of the act of Congress of the United States; and it appearing that this court has jurisdiction of this suit or action, and it being made to appear to this court that, from prejudice and local influence, The Southern Railway Company, a citizen of the State of Virginia, and defendant in this suit or action, will not be able to obtain justice in the superior court of McDowell county, it being the State court, nor in any other State court to which the said defendant may, under the laws of the State of North Carolina have the right, on account of such prejudice and local influence, to remove said cause, it is found as a fact that such prejudice and local influence do exist, as set out in the petition and affidavit filed in this cause:

It is therefore, on motion of counsel for defendant, Southern Railway Company, considered and ordered, that the petition, bond and affidavit filed herein are sufficient, and that the same are accepted and approved.

It is further ordered and adjudged, that the clerk of this, the circuit court of the United States, certify to the State court,
16 to wit, the superior court of the county of McDowell, the same being within this the western district of North Carolina, this order of removal, together with copies of the petition, bond and affidavit, to the end that the State court may be advised of the action of this court and of its order of removal; and to the further end that the said State court may proceed no further with the said suit or

action; and to the end, also, that the said State court may direct the clerk of the superior court of the county of McDowell to make a full and complete transcript of the record of the said suit or action, and certify the same to this court for trial.

And it is so ordered.

This 25th day of June, 1901.

JAS. E. BOYD,
U. S. Judge.

Clerk's Certificate.

I, H. C. Cowles, clerk of the circuit court of the United States for said district, at Statesville, N. C., do hereby certify the foregoing to be true copies of the petition, affidavit, bond for costs and order of removal of said cause to this court, as fully as the same remain of record and on file in said cause in this office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court at office, this the 5th day of July, A. D. 1901.

H. C. COWLES,
Clerk of said Court.

[Seal of said Clerk.]

17 (Title of Cause.)

Case on Appeal.

This was a civil action, tried before Justice, judge, and a jury at the October term, 1901, of the superior court of McDowell county.

The plaintiff brought this action for $6,000 damages for personal injuries alleged to have been caused by the negligence of the defendant.

The contentions of the parties are fully set out in the pleadings, which are contained in the record proper.

The defendant moved to dismiss this case from the docket, for that the same had been regularly removed to the circuit court of the United States, and exhibited the proceedings, to wit, the petition, affidavit and bond of defendant, and order of removal made by the judge of United States courts. This motion was made at August term, 1901, of the court, and was overruled, when the following order was made by the judge:

Order Refusing Removal.

(Title of Cause.)

In this case it appears to the court that the circuit court of the United States has caused an order for the removal of the case to the circuit court of the United States, upon petition setting forth that the defendant is a non-resident of the State of North Carolina; and it further appearing to the court, by the admission of defendant, through its counsel, that the defendant has complied with the terms of the act of the legislature of the State of North Carolina, being chapter 62 of the acts of the General Assembly of North Carolina at its session of 1899: It is thereupon considered by the court that the

defendant is a corporation of this State by virtue of said act, and that it is not entitled to remove this cause to the Federal court. It is further considered by the court, that the courts of the State of North Carolina have jurisdiction of this cause, and this court declines to surrender jurisdiction thereof. It is ordered by the court, that a copy of this order be sent to the clerk of said circuit court of the United States by the clerk of this court.

(To this order defendant excepted.)

At the time this order was made the plaintiff insisted upon his right to try, but the court ordered the continuance, the judge stating to the defendant's counsel that it would stand for trial at the next term. And at October term, when the case was called for trial, the motion was again made by defendant to continue, and refused.

(To this order defendant excepted.)

18 *Issues and Verdict.*

The following issues were submitted to the jury:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

Answer. "Yes."

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer?

Answer. "No."

3. What damages did the plaintiff sustain?

Answer. "$2,000."

The jury found all issues in favor of the plaintiff and assessed his damages at $2,000.

(There was a motion for a new trial. Motion overruled, and defendant excepted. Eleventh exception).

There was a judgment according to the verdict, which is set out in the record proper, and from this judgment the defendant, on October 25, 1901, appealed in open court to the supreme court of North Carolina.

The court adjourned for the term October 31, 1901.

Notice waived. Appeal bond in the sum of fifty dollars ($50) adjudged sufficient.

Assignments of Error.

The defendant assigns as error:

1. The refusal of the court to dismiss this cause, because the same had been regularly removed to the Federal court, as provided by law.

The above case, as modified, is, by consent of counsel, settled as the case on appeal.

M. H. JUSTICE,
Judge Fourteenth District, Presiding.

November 12, 1901.

Clerk's Certificate.

NORTH CAROLINA, }
McDowell County. }

I, Thomas Morris, clerk of superior court for the county of McDowell and State of North Carolina, do hereby certify the foregoing to be a true copy of the record in the above-entitled cause as fully as the same remain- of record and on file in said cause in this office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, this the 13th day of November, 1901.

[SEAL.] THOMAS MORRIS,
Clerk of Superior Court, McDowell County.

(*Docket Entries.*)

Defendant's appeal docketed Nov. 15, 1901, argued Nov. 29, 1901. Opinion delivered Dec. 17, 1901, as follows:

19 N. C. Supreme Court, August Term, 1901.

McDOWELL:

J. H. ALLISON
v.
SOUTHERN RAILWAY CO., Appellant. } # 473.

Geo. F. Bason, for appellant.
Justice & Pless, for appellee.

MONTGOMERY, *J.:*

The defandant is now and was at the time of the commencement of this action a domestic corporation originally created and organized under the laws of the State of Virginia, and, by proceedings in the circuit court of the United States for the western district of North Carolina, obtained an order for the removal of the action from the superior court of McDowell county to the circuit court of the United States in and for the western district of North Carolina.

The plaintiff in his complaint alleged his damages to be $6,000, and the order of removal was based upon affidavits alleging local prejudice. The proceedings were certified to the superior court of McDowell county, and a motion of defendant's counsel to dismiss the action from the docket because of the order of removal was refused by his honor. The reason assigned for his honor's refusal to dismiss the action, or to stay proceedings in the State court, was that the defendant had complied with the terms of the act of the legislature of the State of North Carolina, chapter 62 of the Acts of 1899 and thereby became a corporation of this State. The ruling of his honor is sustained by the cases of Debnam *v.* Telephone Co., 126 N. C. 831 and Layden *v.* Knights of Pythias, 128 N. C. 546.

The defendant then moved to continue the cause on the alleged ground that the petition of the plaintiff to sue *in forma pauperis*

showed that his counsel had taken the case for a contingent fee, and was therefore "a partner in the suit, as much so, as if his name had appeared in the summons and the complaint;" and also upon the ground that plaintiff's counsel was a son of the judge before whom he proposed to try the case. His honor we think properly refused the motion.

The plaintiff in his affidavit affirmed that he was unable to give a prosecution bond in the sum of $200, or to make a deposit of like amount for the same purpose; but it did not necessarily follow that he was unable to compensate his counsel in some way other than by a division of the amount of recovery, or that his counsel had
20 not assumed the prosecution of the suit without compensation.

But suppose it was the contract between the plaintiff and his attorney that the attorney's compensation should be contingent upon recovery and that fact should have been known to his honor, should his honor have declined to preside over the trial, as judge, because of the interest which his son had in the recovery? We know of no law which requires such a course on his part. The judges of our courts are presumed to be men of character and learning, and not to be influenced by fear, favor or affection towards any suitor or attorney in causes before them. And especially in this case does the judge seem to be justified in proceeding with the trial. He stated "that he knew not nor cared what arrangements counsel had with client as to fees. That he had no interest whatever in the matter, and that he was fully conscious of his ability to try the case with absolute impartiality. That he had two sons practicing law in his district who had been often appearing and trying cases before him, and that to grant this motion now would be to make an admission of his inability to hear their cases impartially, which his feelings did not justify, and which he did not feel called upon to make; besides, it appeared to the court that, at the local bar meeting, when the calendar for this term was made, one of the defendant's counsel was present and requested that this case be placed on the calendar a day certain with other cases for the accommodation of other of defendant's counsel, and that it was so arranged for trial, and that out of twenty cases on the calendar Justice & Pless appeared in eighteen of them, and this was the first case called for trial, and a continuance of this on such ground would set a precedent to continue the calendar and adjourn the court. That the judge then stated that unless other grounds for continuance were offered, he would proceed to try the case, as he could not abdicate the bench or disbar his relatives from practicing by granting continuances upon this ground."

The fifth and sixth exceptions of the defendant concerned certain instructions given by his honor on the question of the defendant's negligence The fifth exception is to that part of the charge which is in this language

21 "If you believe from the evidence that the plaintiff was a section hand, and Martin was a track foreman or section boss in the employment of defendant company, and was a vice-principal of the plaintiff, and the duties of the plaintiff and Martin are as set out in the printed rules introduced in evidence, and that Martin

ordered his hand car put on the track by plaintiff and others and ordered plaintiff and others to go on said car towards Old Fort, said Martin knowing there was a past-due train liable to come along the track meeting them, and the said Martin, without informing plaintiff of the danger, met the train at a point where it could not be seen by those on the hand-car until it was within 510 feet of them, and would reach the point where the hand car was in *to* nine to ten seconds, and said Martin had not sent out a flagman or taken other precaution to protect the plaintiff, this would be negligence on the part of defendant, and the plaintiff would not be guilty of negligence in riding on said hand car."

And the sixth exception is to that portion of the charge which is in these words:

It was his duty to listen and look, and in case danger was reasonably to be apprehended from a belated train or otherwise, to send a flagman in front of the hand car to notify the engineer on the train, so that the train might be stopped or slowed up, or by bell or whistle give notice of its approach, in order that the hand-car crew might save themselves from danger. If you find that there was negligence on the part of the track foreman in his duties as just defined to you, and find that he was the defendant's agent, as I have described the agency to you, and plaintiff's superior, and further find that the injury occurred, if it did occur in the preformance of the duties conferred on the agent, and that Martin negligently ordered plaintiff to go on the track to remove the car, and that the injury was the result of the negligence of Martin, then you will answer the first issue "Yes."

There was evidence on the part of the plaintiff going to show that the plaintiff and others were, at the time of the plaintiff's injury, under the control and management of a man by the name of Martin and that he was the section master, or track foreman of the defendant company, and that he hired and discharged hands without consultation or advice from anybody; that a day's labor on the part of Martin's employees began in the morning when they put the car on the track, and ended after the hand car was put in the tool-house; that when the day's work was over and Martin and the hands upon the hand car were returning to their homes, they met sud-
22 denly, a freight train that was known to be late by both Martin and the plaintiff, and at a distance of about one hundred yards off before it was seen—the view of the approaching train being obstructed by a curve in the shape of an S; that no signals or precaution had been taken by Martin to discover the approach of the belated train, as was required by the rules of the company.

The rules and regulations of the company in respect to track foremen were introduced, and from them it appeared that the track foreman had charge of the track, laborers and road watchmen employed upon that section; that a constant lookout should be kept for trains, and that when there was not a clear view of the track far enough to insure absolute safety, flagmen must be sent out with danger signals to protect them.

There was also evidence on the part of the plaintiff tending to

show that the whole party jumped from the hand car when they saw the rapidly approaching train about a hundred yards off, and were in places of safety, but at the sudden and peremptory command of Martin the plaintiff attempted to go back and lift the hand car from the track, and in so doing was struck by the engine and badly hurt.

Upon that testimony we can see no error in the instructions of his honor, which have been complained of. The *defendant* was negligent whether he informed the plaintiff or did not inform him of the danger of a collision.

On the question of whether the plaintiff contributed to his own injury, the defendant excepted (8th exception) to the following instruction of his honor: "If however the act required of the plaintiff was essentially hazardous, he was not bound by his duties to obey the orders, and would not be exculpated from the charge of contributory negligence. By the language 'essentially hazardous,' is meant apparent certainty to plaintiff that the act would cause injury." There was no error in that instruction under the evidence and circumstances of this case. Ordinarily, however, that would not be the rule, and a person would certainly be guilty of contributory negligence if he obeyed the orders of his superior in cases where it appeared reasonably certain that his obedience would be attended with injury to himself. In Hinshaw *v.* Railroad, 118 N. C. 1047 where a passenger, after having been told by the conductor to get off, did so and was
23 hurt because the place was not a safe one for him to alight, all of which was seen and known by the plaintiff, this court said "The danger must not only be apparent but great—more chances against a safe exit than in favor of it." That we think would be a safe rule to be applied ordinarily in cases where employees were ordered by their superiors to do certain acts in the ordinary course of their business. But in cases like the one now before the court, where there was em-inent peril of a collision between a train moving at 30 or 35 miles an hour down-grade, and a hand car, its occupants being greatly excited and disturbed by the sudden approach of the train, we think, as did his honor, that in the effort to prevent the effects of such a collision an order from the foreman to an employee to return to the track to throw the hand car off could be obeyed without culpability on the part of the employee, unless it was certain that in doing so injury would occur to him.

Further, under the head of contributory negligence his honor instructed the jury that "if the plaintiff was an employee of defendant, and by reason of the negligence of the defendant through a vice-principal, Martin, put in sudden peril and great danger, and immediately after the plaintiff had extricated himself from his hazardous and dangerous position, was commanded by such vice-principal to help get a hand car off the track, and if, in attempting to obey this order, was hurt, the law in regard to the contributory negligence of the plaintiff is as follows—'If the agent of the employer' and the vice-principal of the plaintiff 'suddenly commanded the plaintiff (a laborer) to do an extra-hazardous act in the course of his duty, one that may, though not probably, be safely done by ob-

serving due care, one that must be done at once, if done at all, and if the laborer obeys the command promptly, moved only by a faithful sense of duty, and as a consequence suffered serious bodily injury—in that case the injured party does not contribute to his own injury.'"

We think the instruction a proper one, and that the law as announced in Patton *v.* Railroad, 96 N. C. 456 supports the charge.

The other exceptions of the defendant are only variations in
24 the manner of their statement of the principles of law which we have discussed, and it is not necessary to particularly consider them.

No error.

Douglas J. concurs in the result.

25 FURCHES, *C. J.*, concurring in the judgment:

This action is *in forma pauperis*, and the counsel of plaintiff is the son of the judge presiding at the trial. When the case was called for trial the defendant called the attention of the court to this fact, and alleged that the plaintiff's counsel was prosecuting the case under a contract for a part of the recovery as a contingent fee. The plaintiff's counsel in arguing this motion, called it extraordinary, but did not deny the facts alleged by the defendant. The court refused the motion, giving his reasons therefor, as set out in the opinion of this court.

The motion was not alone made upon the ground that the presiding judge was the father of plaintiff's counsel. If it had been made upon this ground alone, it would have been extraordinary, and contrary to the uniform practice in this court and in the superior courts of the State.

The record states the motion as follows: "The defendant then moved to continue the case, for that, as was sufficiently shown by the petition of plaintiff to bring this suit *in forma pauperis*, his counsel, E. J. Justice, had taken the same for a contingent fee, and was therefore a partner in the suit, as much so as if his name had appeared in the summons and complaint." This was the motion, and the judge in assigning his reasons for refusing it (among other things) said "that he knew not nor did he care what arrangement counsel had made with his client as to fees; that he had no interest whatever in the matter and that he was fully conscious of his ability to try the case with absolute impartiality * * * ; that out of twenty cases on the calendar, Justice & Pless appeared in eighteen of them, and this was the first case called for trial, and a continuance of this case on such grounds would set a precedent to continue the calendar and adjourn the court."

To make a continuance of this case a precedent for continuing the other 17 cases, would be to put them on the same footing as this case, that is, that they were all *paumer cases brought for contingent fees*. This I am satisfied was not the case and the reason assigned, as I think, does his son injustice. And it may be that it does his

other son injustice, as I am inclined to think it does. If the
26 motion had been made to continue for the reason alone that the plaintiff's counsel was the son of the presiding judge, then the grounds stated would have been correct.

The law of this State adopting the law of England as far back as Eleventh Henry VII did not allow an attorney "to take any fee or reward" for his services in pauper suits. Revised Statutes ch. 31 sec. 153; Rev. Code ch. 31 sec. 43, which continued to be the law until the adoption of the code, as it was regarded as a species of champetery. But that is not the law now and probably never will be again. But it is doubtful whether there should not be some legislation with regard to such fees.

Under the law, as contained in the Revised Statutes and the Revised Code an administrator was not allowed to bring and prosecute a suit *in forma pauperis*. McKeil *v.* Cutler, 45 N. C. 139. This question, so far as I am advised has not been presented to the court since the act of 1868–'9 (Code sects. 210, 211). But no such motion was made in this case, and no such question is before the court now; and I know the practice has been otherwise since the adoption of the code.

I shall take it then, at least so far as this case is concerned, that Mr. Justice had the right to bring this suit *in forma pauperis* and to contract with his client for a part of the recovery as a contingent fee, and this brings up the question of his pecuniary interest in the recovery. And taking it that he had a direct pecuniary interest in the recovery, or that he was to have all the recovery, or that it had been his own action, I know of no law in this State that would have prevented his father from trying the case. This I think was altogether a matter of propriety with him and for him to determine—whether he would or not try the case; and I see no legal grounds upon which this exception can be sustained.

27 (Title of Cause.)

Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of McDowell county:—Upon consideration whereof, this court is of opinion that there is no error in the record and proceedings of said superior court.

It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable W. A. Montgomery, justice, be certified to the said superior court, to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this court incurred, to wit, the sum of ten $\frac{30}{100}$ dollars ($10.30), and execution issue therefor.

28 SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
JAMES H. ALLISON, Defendant in Error.

Agreement.

It is agreed between counsel for plaintiff and defendant, in the above-entitled case, that in making up the record for the Supreme Court of the United States, there shall be omitted the portions of the printed record on file in the supreme court of North Carolina commencing with the twenty-fifth line on page eighteen down to and including line seventeen on page fifty-one; also commencing with line nine on page fifty-two down to and including the names of attorneys on page fifty-three. All other portions of said record and the decision and opinion of the supreme court of North Carolina, delivered by Mr. Justice Montgomery, shall be certified to the Supreme Court of the United States as a part of the record in this above-entitled case.

January 18, 1902.

F. H. BUSBEE,
Attorney for Plaintiff in Error.
JUSTICE & PLESS,
Attorneys for Defendant in Error.

Certificate.

I Thomas S. Kenan, clerk of the supreme court of North Carolina do certify the foregoing to be a true and correct copy (subject to the above stipulation of counsel) of the record in the above-entitled action, as appears from the files of this court.

Given under my hand and seal of said court at office in Raleigh on this the 21st day of January, 1902.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk Supreme Court of N. C.

Endorsed on cover: File No. 18,392. North Carolina supreme court. Term No. 232. Southern Railway Company, plaintiff in error, *vs.* John H. Allison. Filed February 1st, 1902.

LE COPY.

Office Supreme Court U. S.
FILED
JAN 23 1903
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 282.

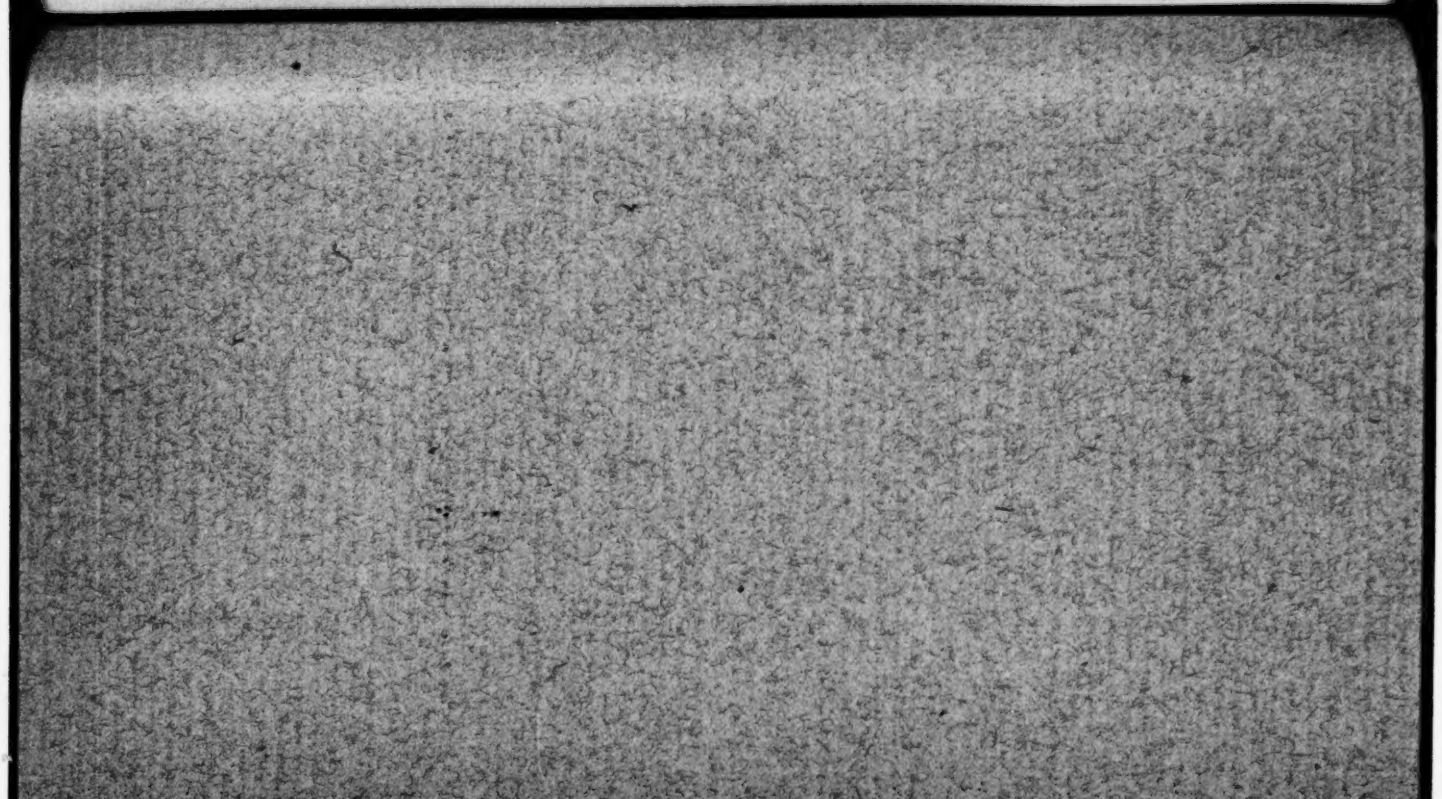
SOUTHERN RAILWAY CO., PLAINTIFF IN ERROR,

vs.

JOHN H. ALLISON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR, SOUTHERN RAILWAY CO.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 232.

SOUTHERN RAILWAY CO., PLAINTIFF IN ERROR,

vs.

JOHN H. ALLISON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

Brief for Plaintiff in Error, Southern Railway Co.

This case is brought to this Court upon a writ of error from the Supreme Court of North Carolina, and presents practically but two questions: Has a railroad company, incorporated in another State and operating, by lease and otherwise, lines of railroad in North Carolina, which has complied with the terms of an "Act to provide a manner in which foreign corporations may become domestic corporations" (Public Acts N. C., 1899, chapter 62), a right under the laws of the United States to remove a case to the United States Circuit Court?

Can the allegations in petition for such removal, filed in the United States Circuit Court, be controverted in the State courts?

FACTS.

The facts are few and without complication.

The plaintiff in error, Southern Railway Company, is a corporation created under the laws of the State of Virginia, and for years has carried on the usual business of a railroad company and common carrier, both as regards interstate and domestic traffic, upon leased and controlled lines of railroad in the State of North Carolina.

On February 10, 1899, the General Assembly of North Carolina passed the following statute (Public Acts 1899, chapter 62):

The General Assembly of North Carolina do enact:

SECTION 1. That every telegraph, telephone, express, insurance, steam-boat and railroad company incorporated, created and organized under and by virtue of the laws of any State or government other than that of North Carolina, desiring to own property or to carry on business or to exercise any corporate franchise whatsoever in this State, shall become a domestic corporation of the State of North Carolina by filing in the office of the Secretary of State a copy of its charter duly authenticated in the manner directed by law for the authentication of statutes of the State or country under the laws of which such company or corporation is chartered and organized, and a copy of its by-laws duly authenticated by the oath of its secretary. Such corporation shall pay therefor to the Secretary of State, to be turned over by him into the State treasury, such fees as are or may be required by law.

SEC. 2. That if any such charter or by-laws, or any part thereof, filed in the office of the Secretary of State shall be in contravention or violation of the laws of this State, such charter or by-laws or such part thereof as are in conflict with the laws of this State shall be null and void in this State.

SEC. 3. That when any such corporation shall have complied with the provisions of this act above set out, it shall thereupon immediately become a corporation of this State and shall enjoy the rights and privileges and be subject to the liability of corporations of this State the same as if such corporation had been originally created by the laws of this State. It may sue and be sued in all courts of this State and shall be subject to the jurisdiction of the courts of this State as fully as if such corporation were originally created under the laws of the State of North Carolina.

SEC. 4. That on and after the first day of June, eighteen hundred and ninety-nine, it shall be unlawful for any such corporation to do business, or to attempt to do business in this State without having fully complied with the requirements of this act.

SEC. 5. Any such corporation violating any provision of this act shall forfeit to the State of North Carolina a penalty of two hundred dollars for each and every day after the first day of

June, eighteen hundred and ninety-nine, on which such corporation shall have continued to operate or do business without having complied with the requirements of this act. Such penalty shall be recovered by the Treasurer of the State for the benefit of the State of North Carolina, and it shall be his duty to sue for such forfeitures in the Superior Court of Wake county as the same accrue.

SEC. 6. No telegraph, telephone, express, insurance, steamboat or railroad company, which is a foreign corporation of another State doing business in North Carolina, shall be allowed to sue in the courts of North Carolina on or after June first, eighteen hundred and ninety-nine, until such foreign corporation has become a domestic corporation, either by a special act of the Legislature, or under the provisions of this act.

SEC. 7. No such foreign corporation, mentioned in the preceding section of this act, shall be allowed to enter into a contract in the State of North Carolina, on or after the first day of June, eighteen hundred and ninety-nine, nor shall any such contract heretofore or hereafter made, or attempted to be made and entered into by such corporation in the State of North Carolina be enforcible by such corporation unless such corporation shall, on or before the first day of June, eighteen hundred and ninety-nine, become a domestic corporation under and by virtue of the laws of North Carolina.

SEC. 8. Any such corporation violating the provisions of this act by doing any business in this State without first becoming a domestic corporation in the manner prescribed by law, shall, in addition to the penalty prescribed in section 5 of this act, forfeit a penalty of five hundred dollars for each day any such business shall be done by it in the State of North Carolina on or after the first day of June, eighteen hundred and ninety-nine. The amount so forfeited under the provisions of this section shall be recovered by the Treasurer of North Cadolina and it shall be the duty of said State Treasurer to institute suit for same in the Superior Court of Wake county: *Provided*, the business contemplated in this section of this act does not embrace such business as is strictly the business of interstate commerce.

SEC. 9. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

SEC. 10. That this act shall be in force from and after its ratification.

Ratified the 10th day of February, A. D. 1899.

It was admitted in the State court (although it did not appear in the petition for removal or in any pleading) that the South-

ern Railway had complied with the terms of the above quoted "domestication act" (as the act of 1899 will be termed in this brief).

J. H. Allison, defendant in error, was injured by the alleged negligence of the plaintiff in error in the year 1900, and brought suit in the Superior Court of McDowell county, North Carolina. The Southern Railway on June 25, 1901, filed in the U. S. Circuit Court for the Western District of North Carolina a petition for the removal of the cause to the U. S. Circuit Court for the Western District of North Carolina, upon the ground of prejudice and local influence. The petition is in an approved form, reciting that the Southern Railway is "a corporation, duly created and organized under the laws of the State of Virginia, and is not a resident of this State (North Carolina); that it was, at the commencement of this suit, and still is, a citizen of Virginia." It also alleged that Allison "was, at the beginning of the suit, and still is, a citizen and resident of North Carolina; that the amount in controversy exceeded $2,000, and that from prejudice and local influence it could not obtain justice in the Superior Court of McDowell county, or in any other court to which, under the laws of North Carolina it had a right to remove the case, on the ground of such prejudice and local influence."

The petition was accompanied by the usual bond, and also by an affidavit setting forth categorically that the prejudice existed, and that there had been many trials of actions against the Southern Railway in McDowell county, and that without regard to the weight of evidence the verdicts had been invariably against the railroad company.

The Judge of the U. S. Court found as a fact that the petitioner could not obtain justice in the Superior Court of McDowell county or in any other court to which the defendant had the right, on account of such prejudice or local influence, to remove the suit, and ordered the removal.

When the case was called for trial at August Term, 1901, of the Superior Court of McDowell county, the defendant exhib-

ited to the Court a transcript of the proceeding, petition, affidavit, bond and order, duly certified, but the Court refused to dismiss the case from the docket or to proceed no further therein, and signed an order which appears on page 14 of the record, adjudging that the Southern Railway was a corporation of North Carolina, and was not entitled to remove the cause to the Federal Court, and the State court refused to surrender jurisdiction. To this the defendant (now the plaintiff in error) excepted.

At October Term, 1901, of McDowell Superior Court, when the case was called for trial the motion was renewed and again refused, and the defendant (plaintiff in error) again excepted. The case proceeded to trial, there was a verdict and judgment against defendant, and an appeal to the Supreme Court of North Carolina.

Upon the appeal the judgment of the court below was affirmed, in an opinion filed by Montgomery, Justice, to be found in the record on pages 16-20, and reported as Allison *vs.* R. R., 129 N. C., 336.

The defendant in that appeal (the plaintiff in error herein) sued out a writ of error from the Supreme Court of North Carolina, which was allowed by Chief Justice Furches.

QUESTIONS PRESENTED.

The questions presented are:

1. Has the State court the right to pass upon the question, whether a corporation which has been adjudged by the United States Court to be a foreign corporation, in a proceeding to remove to the United States Court on the ground of prejudice and local influence, is a domestic corporation, or is the finding by the United States Court conclusive upon the State court?

2. Has a corporation, which is organized under the laws of some other State than North Carolina, and which has complied with the terms of the domestication act of North Carolina, the right to remove a case to the U. S. Circuit Court?

PRELIMINARY ARGUMENT.

The plaintiff in error will not enter upon any extended argument upon those matters of practice which must be regarded as settled. The petition for the removal of a cause from a State court to the U. S. Circuit Court on account of prejudice or local influence can be made only in the Federal Courts. The statute requires that it *"be made to appear to the said Circuit Court* that from prejudice or local influence the defendant will not be able to obtain justice in any State court, etc." Pennsylvania Co. *vs.* Bender, 148 U. S., 255; Williams *vs.* Telephone Co., 116 N. C., 560; Blackwell *vs.* Railroad, 107 N. C., 217; Bender *vs.* Meikle, 77 Fed., 485. Under the provisions of the removal act of 1887, amended as in 1888, where all the plaintiffs are citiens of the State where the suit is brought, any defendant who is a citizen and resident of another State may remove the cause, upon a proper showing as to the existence of prejudice and local influence. Bonner *vs.* Meikle, 77 Fed., 489; Jackson *vs.* Pearson, 60 Fed., 113, and many cases cited.

"The proper way is for him to obtain an order for the removal from the Federal Court, file that order in the State court, and take from it a transcript, and file it in the Federal Court." Penn. Co. *vs.* Bender, 148 U. S., 255. "The application must be supported by such proof as satisfies the Federal Court to which it is presented of the true facts of its allegations. The evidence necessary to support the Federal jurisdiction does not have to prove morally that the petitioning defendant cannot obtain a just decision in the State court. It is only necessary to present to the Circuit Court evidence suitable to the case, and sufficient to prove legally that prejudice and local influence do exist, which will naturally operate to the disadvantage of the defendant in the trial of his case before a State tribunal." Tacoma *vs.* Wright, 84 Fed., 836.

The case just cited was an equity case, and the difficulty of proving the existence of local prejudice in a case to be tried by a chancellor, was naturally greater than in proving such preju-

dice to exist among the people from whom jurors are usually chosen; but the removal was sustained.

As was said by Mr. Justice Bradley *in re* Pennsylvania Co., 137 U. S., 451, "The amount and manner of proof in each case must be left to the discretion of the Court itself."

In the present case it is shown that the petitioning defendant had seen case after case tried in the county of McDowell before juries, and notwithstanding the preponderance of evidence was sometimes in favor of the defendant, in no single instance had any verdict ever been rendered in favor of the railroad company.

The plaintiff did not seek to take advantage of the provision of the statute authorizing him to present affidavits to the court of the non-existence of such prejudice upon a motion to remand, but relied solely upon the contention that the Southern Railway was a citizen of North Carolina. So far as the record shows, the utterly uncontradicted proof before the court made it clear that the defendant could not obtain justice in the courts of McDowell.

But it may possibly be contended that under the North Carolina statute the defendant would have a right to remove the cause for trial to the court of some adjoining county. The laws of North Carolina do not give such right to the defendant. The Code, Section 196 (eliminating the references to criminal actions) provides: "In all civil actions in the Superior Courts, in which it shall be suggested on oath or by affirmation on behalf of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the court in which the action should be pending, the Judge shall be authorized to order a copy of the record of said action to be removed to some adjacent county for trial, if he shall be of the opinion that a fair trial cannot be had in said county, after hearing all the testimony which may be offered on either side by affidavits."

"Sec. 97. No action, whether civil or criminal, shall be removed, unless the affidavit shall set forth particularly and in

detail the ground of the application. And it shall be competent for the other side to controvert the allegations of fact in said application, and to offer counter affidavits to that end. And the Judge shall order the removal of any such action if he shall be satisfied, after thorough examination of the evidence as aforesaid, that the ends of justice demand it."

This statute does not give either party any *right* to remove, but only authorizes the court in its discretion to make such order. It is purely a matter of judicial discretion which cannot be reviewed by the Appellate Court. State *vs.* Johnson, 104 N. C., 780. Such statutes merely authorizing a change of venue, and not giving to a party "the right to remove" a cause, are not to be considered as affecting in any way a defendant's *right* to remove a cause into the U. S. Circuit Court. Herndon *vs.* Railroad, 73 Fed., 308; Tacoma *vs.* Wright, 84 Fed., 836, and other cases cited.

Can the State court review the finding of the United States Court that the petitioner is not a citizen of North Carolina?

The plaintiff in error may well contend that, when the petition for removal and the order were regular in form, the State court could not review any question of fact, either as to the citizenship of the petitioner or the existence of prejudice, which did not appear upon the face of the record. The defendant was not obliged either to admit or deny in the State courts the facts concerning its domestication, because that fact could have been shown in the Federal Court upon a motion to remand.

The Federal Court alone is the proper tribunal to pass upon the questions of fact and law involved in a removal, and the ultimate tribunal which must pass upon the questions involved is the Supreme Court of the United States, whether the cause shall be taken through the Federal Courts or by writ of error from the State courts.

Whether the Southern Railway is a citizen of North Carolina or not, is a question of *fact,* unless all the facts in regard to its citizenship appear upon the record. The plaintiff in error did not seek to conceal that it had complied with the domestication act of North Carolina, nor was that fact concealed in the

application to the United States Court. When an order for removal is signed and a certified copy of petition, bond, affidavit and order certified to the State court, it is respectfully submitted that the decision upon the fact of citizenship cannot be reviewed by the State court, unless there is something in the record to justify such reviewal. This is true whether the fact depends upon a question of law or not. Of course if the record shows upon its face that the order of removal was without legal justification, because the petitioner was a citizen of North Carolina, the State court is under no obligation to relinquish its jurisdiction. In the present case there is no doubt as to the *fact* of the "domestication" of the Southern Railway in compliance with the terms of the act, because it was admitted (though not in the record) in the State court. But as this fact did not appear in the record of the petition for removal, all questions arising in regard to it should be passed upon in the court where the petition for removal was filed, and cannot be reviewed collaterally by the State court.

In Powers *vs.* C. & O. Ry., 65 Fed., 129, it is held that it is not for the State court to pass upon the facts involved in the averments of a petition for removal. It can only deny an application to remove when, as a matter of law, in the face of the petition and the facts disclosed by the record, the right does not exist.

To the same effect are R. R. *vs.* Dougherty, 138 U. S., 298, and Crehore *vs.* R. R., 131 U. S., 240; R. R. *vs.* Dunn, 122 U. S., 513.

NO OBJECTION TO A REVIEW UPON THE MERITS.

The plaintiff in error, however, will not object to a decision upon the merits. The Southern Railway Company desires to obey, both in letter and spirit, the laws of the State of North Carolina properly construed in accordance with the Constitution and laws of the United States.

If, under the act of 1899, the Southern Railway Company, a Virginia corporation, but domesticated under the laws of

North Carolina, has lost its rights under the statutes of the United States, it desires to be fully informed at the earliest day possible.

The order of removal was valid.

Assuming that the question is properly presented by the record, and that the State court had a right to pass upon the question, it is submited that a railroad corporation, chartered in Virginia, which operates by lease and otherwise railroads in North Carolina, and which has complied with the terms of the domestication act, has the right to remove a case to the United States Courts.

If the plaintiff in error has correctly conceived the point in issue, the question is neither novel nor complicated. It has been expressly decided by the Supreme Court of the United States, by the Supreme Court of South Carolina and by several Federal Courts, and so far as the researches of the plaintiff in error have gone, the only appellate tribunal in the United States which has asserted and continued to maintain a contrary opinion, is the Supreme Court of North Carolina.

The facts which appear in the record and the statute which has been construed by the North Carolina Supreme Court have already been set forth. There is no suggestion that the domestication act constituted a new corporation of citizens of North Carolina, or conferred upon such corporation the right to build or operate any railroad in the State, except in so far as it authorized the lease, operation or construction of railroads already incorporated under specific charters obtained in North Carolina. It is not admitted that a statute of this kind would have changed the result, but it is merely mentioned to demonstrate that in this respect the case for the plaintiff in error is decidedly stronger than the Kentucky case cited below.

The provisions of the North Carolina statute in brief are, that a railroad company, incorporated under the laws of another State, seeking to operate any railroad or to exercise any franchise in North Carolina, shall become a domesticated corporation by filing a copy of its charter, etc., in the office of the

Secreatry of State, and that after compliance with this requirement it shall immediately become a "corporation of this State." The remainder of the statute prescribes regulations for carrying out its provisions, and penalties for its violation.

In order to apply the decisions it will perhaps be advisable to set forth a synopsis of this statute of other States upon this subject which have been passed upon in the cases to be cited.

STATUTES OF OTHER STATES.

By comparison of the various statutes construed by the courts in the several cases, the analogy between the statutes of South Carolina, Kentucky, Arkansas, Nebraska and Tennessee, and the North Carolina statute, will clearly appear. The South Carolina statute is construed in Mathis *vs.* R. R., 53 S. C., 257, and in Wilson *vs.* R. R., 36 S. E., 701, Acts 1896, 22 S. C. Stats. at Large, chapter 114. Section 1791 provides that every railroad corporation, created or organized by virtue of any government other than that of this State, desiring to carry on business or to exercise any corporate franchise in this State of any kind whatever, shall file in the office of the Secretary of State a copy of its charter, paying, etc., to be registered in each county through which the railroad passes. Section 1792 provides that if any part of such charter is in contravention of the laws of South Carolina it shall be void. Section 1793: "When a foreign corporation complies with the provisions and requirements of this chapter, it shall *ipso facto* become a domestic corporation and shall enjoy the rights and be subject to the liabilities of such domestic corporation; it may sue and be sued in the courts of the State and shall be subject to the jurisdiction of this State as fully as if it were originally created under the laws of South Carolina.

The facts in regard to the statute of Kentucky, construed in the case of Louisville, N. A. & C. R. R. *vs.* Louisville Trust Co., 174 U. S., 552, are as follows: The petitioner called "The New Albany Company" was incorporated under the laws of the State of Indiana. In 1880 the Kentucky Legislature passed

an "Act to incorporate the New Albany and Chicago Railway Company," section one of which provides: "The Louisville, New Albany and Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations, and authority to operate a railroad." The second section gave power to buy or lease land for depot purposes and tracks and connections therewith, in the city of Louisville, and also the right to condemn for the same.

It should be noted that this statute actually gives *proprio vigore* the right of eminent domain in Kentucky.

The Arkansas statute of 1881, construed in Railway *vs.* James, 161 U. S., 545, provided that a railroad company incorporated by another State, owning a line running to the boundary of Arkansas, might purchase the rights of any Arkansas railroad connecting with it and construct, operate, etc., such railroad.

A subsequent statute, passed in 1889, provided that every railroad corporation which had purchased a railroad in that State should, within sixty days from the passage of the act, file a copy of its articles of incorporation or its charter with the Secretary of State and should "thereupon become a corporation of this State, anything in its articles of incorporation or charter to the contrary notwithstanding." And the railway company forthwith filed a copy of its articles of incorporation, granted under the laws of Missouri.

The Constitution of Nebraska, construed in Walters *vs.* R. R., 104 Fed. R., 377, provides that "no railroad organized under the laws of any other State or of the United States, and doing business in this State, shall be entitled to exercise the right of eminent domain, etc., until it shall have become a body corporate in accordance with the laws of Nebraska."

The statute of Tennessee, Acts 1877, chapter 31, at first applicable to mining companies only, was made applicable to all corporations by Acts 1891, chapter 122. It provides that "when

a corporation complies with the provisions of this act it shall be to all intents and purposes a domestic corporation, and may sue and be sued in the courts of this State, just as though it were created under the laws of this State."

The Supreme Court of North Carolina based its decision in the series of cases construing the North Carolina domestication act upon what it regarded as the exact analogy between the Alabama statute, construed in the case of Memphis, etc., R. R. *vs.* Alabama, 107 U. S., 581, and the North Carolina statute. It is therefore deemed proper to cite also the Alabama statute construed in that case. The differences are underlying and apparent at a glance.

A railroad was proposed to establish connections between Memphis, Tennessee, and Charleston, S. C., and was incorporated in Tennessee. The best line ran through Northern Alabama, and in 1850 the Legislature of Alabama passed "An act to incorporate the Memphis & Charleston Railroad Company."

The preamble recited the passage of an act and an amendatory act by the State of Tennessee, incorporating the Memphis & Charleston Railroad Co., and that it is believed that the most eligible route is through a portion of Alabama.

The act provided that the company should have a right of way, etc.; for the construction of branch lines, etc. The third section provided for *opening books of subscription* in Alabama, to permit *citizens of Alabama* to subscribe as much as $1,500,000 to the capital stock; the fourth section provided for meetings of stockholders in *Alabama* and the election of directors; the fifth, that money subscribed in Alabama shall be first applied to the construction of the railroad in that State. All subsequent legislation speaks of the company as incorporated by the Legislature of Alabama. That such a corporation is an Alabama corporation and a citizen of Alabama is clear; but it would seem to be equally clear that there is no analogy between such a statute and the one now before the Court.

The plaintiff in error regards the question of citizenship of domestic corporations as *res judicata* in this Court.

In St. L. & S. F. Ry. Co. *vs.* James, 161 U. S., 545, the St. L. & S. F. Ry. Co., a Missouri corporation, under the provisions of the Arkansas statute cited above, page 12, filed in the office of the Secretary of State of Arkansas, a certified copy of its articles of incorporation under the laws of Missouri. A citizen of Missouri sued the corporation in the U. S. Circuit Court for the Western District of Arkansas. Upon an objection to the jurisdiction, the following question was certified to the Supreme Court of the United States.

2. In view of the provisions of Arkansas statute of 1889 (the substance of which will be found on page 12), did the St. L. & S. F. R. R., by filing a certified copy of its articles of incorporation under the laws of Missouri, with the Secretary of State of Arkansas, and continuing to operate its railroad through that State, become a citizen of Arkansas, so as to give the U. S. Circuit Court for the Western District of Arkansas jurisdiction of an action in which the defendant in error (original plaintiff) was and is a citizen of Missouri?

Despite any ingenious quibble, this is almost the exact question presented in the case now before the Court.

In view of the provisions of the North Carolina "domestication act," did the Southern Railway, by filing a certified copy of its charter under the laws of Virginia, with the Secretary of State of North Carolina, and by continuing to operate its railroad, become a citizen of North Carolina so as to deprive the U. S. Circuit Court of the Western District of North Carolina of jurisdiction of an action in which the defendant in error (originally plaintiff) is a citizen of North Carolina?

The statutes of Arkansas and of North Carolina in their main features are intended to accomplish the same result—that is to make a domestic corporation out of a foreign one, by filing its charter in the office of the Secretary of State.

Justice Shiras, speaking for the Court, after citing at length the statutes of Arkansas, reviews the following cases: Bank *vs.* Deveaux, 5 Cranch, 61; R. R. *vs.* Letson, 2 How., 497; Marshall *vs.* R. R. Co., 16 How., 314; Drawbridge Co. *vs.* Shepherd, 20 How., 233; R. R. *vs.* Wheeler, 1 Black., 286;

M. & C. R. R. Co. *vs.* State, 107 U. S., 581; R. R. *vs.* Whitton, 13 Wall., 270; Penn. R. R. *vs.* St. L., etc., R. R., 118 U. S., 290.

Admitting the difficulty of reconciling all the expressions used in the cases, the following propositions were stated as fairly deducible from them:

"There is an indisputable legal presumption that a State corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal Courts in 'controversies between citizens of different States.'

"It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State, and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State. Such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States.

"Such corporations may be treated by each of the States whose legislative grants they accept as domestic corporations. The presumption that a corporation is composed of citizens of the State which created it accompanies such corporation when it does business in another State, and it may sue or be sued in the Federal Courts in such other State as a citizen of the State of its original creation.

"We are now asked to extend the doctrine of indisputable citizenship so that, if a corporation of one State, indisputably taken, for the purpose of Federal jurisdiction, to be composed of citizens of such State, is authorized by the law of another State to do business therein, and to be endowed for local purposes with all the powers and privileges of a domestic corpora-

tion, such adopted corporation shall be deemed to be composed of citizens of the second State, in such a sense as to confer jurisdiction on the Federal Courts at the suit of a citizen of the State of its original creation.

"We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that State corporations were composed of citizens of the State which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal Courts might be defeated. Then after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it.

"It is true that by the subsequent act of 1889, by the proviso to the second section, it was provided that every railroad corporation of any other State which had theretofore leased or purchased any railroad in Arkansas, should, within sixty days from the passage of this act, file a certified copy of its articles of incorporation or charter with the Secretary of State, and shall thereupon become a corporation of Arkansas, anything in its articles, incorporation or charter to the contrary notwithstanding; and it appears that the defendant company did accordingly file a copy of its articles of incorporation with the Secretary of the State.

"But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation in such a sense as to make it a citizen of Arkansas within the meaning of the Federal Constitution, so as to subject it as such to a suit by a citizen of the State of its origin.

"In order to bring such an artificial body as a corporation within the spirit and letter of that constitution, as constituted by the decisions of this Court, it would be necessary to create

it out of natural persons, whose citizenship of the State creating it could be imputed to the corporation itself. But it is not pretended in the present case that natural persons, resident in and citizens of Arkansas, were, by the legislation in question, created a corporation, and that therefore the citizenship of the individual corporators is imputable to the corporation."

In the case of Louisville, N. A. & C. R. R. vs. Louisville Trust Co., 174 U. S., 552, the question was again before the Court. The Kentucky statute, construed in the Louisville case has been cited above. By an express statute of Kentucky the Indiana corporation, L., N. A. & C. R. R. Co., was "constituted a corporation of Kentucky, with power to sue and be sued, etc., and authority to operate a railroad." The right of eminent domain was conferred.

The Court says it is not material to decide whether the corporation became a Kentucky corporation, in deciding the question of jurisdiction:

"But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this Court to be required for the disposition of this case, either as to the jurisdiction or as to the merits. As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the State of Indiana, even if it was afterwards created a corporation of the State of Kentucky also, it was, and remained, for the purposes of the jurisdiction o fthe Courts of the United States, a citizen of Indiana, the State by which it was originally created. It could neither have brought suit as a corporation of both States against a corporation or other citizen of either State, nor could it have sued or been sued as a corporation of Kentucky in any court of the United States."

The Court reviews at length the opinion in the James case already cited, and strongly re-affirms it, basing its conclusions upon quotations from the opinion, most of which have been given above.

The Supreme Court of South Carolina, in the case of Wilson vs. Southern Railway, S. C. 36, S. E. 701, reviews its former

decision in Mathis *vs.* Southern Railway Co., 53 S. C., 257, and reverses it, conforming its decision to that of the Supreme Court of the United States. The South Carolina statute above cited is practically the same as the North Carolina statute in regard to domestication.

Judge Jones, speaking for a unanimous Court, says frankly:

"In the case of Mathis *vs.* Railway Co., 53 S. C., 257, this Court held that the said Southern Railway Company, having become a domestic corporation by compliance with said act, was not entitled to the benefit of those provisions of the act of Congress of the United States governing the removal of causes from the State courts to the United States Circuit Court because of diverse citizenship. We have been induced to review the case of Mathis *vs.* Railway Co., *supra*, and, after careful consideration, have reached the conclusion that it is not in harmony with the recent decisions of the United States Supreme Court, by which this Court must be controlled on questions of this kind. The Mathis case was supposed to be in harmony with the decision in Memphis & C. R. Co. *vs.* Alabama, 107 U. S. 581, wherein it seemed to hold that the Memphis & Charleston Railroad Company, previously incorporated in Tennessee and afterwards made an Alabama corporation by the statutes of Alabama, could not remove into the Circuit Court of the United States a suit brought against it in Alabama by a citizen of Alabama. But this Court failed to observe the distinction between the creation of a new corporation out of natural persons and the mere adoption of a foreign corporation as a domestic corporation for local purposes. A corporation is indisputably presumed to be composed of citizens of the State creating it, and for purposes of Federal jurisdiction the citizenship of its corporators is imputed to the corporation. In the case of Railway Company *vs.* James, 161 U. S., 545, the Supreme Court of the United States refused 'to extend the doctrine of indisputable citizenship, so that if a corporation of one State, indisputably taken, for the purpose of Federal jurisdiction, to be composed of citizens of such State, is authorized by the law of another State to do business

therein, and to be endowed for local purposes with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second State in such a sense as to confer jurisdiction on the Federal Court at a suit of a citizen of the State of its original creation.' As the right of removal depends upon diverse citizenship, we take it that the United States Court, upon the principle announced above, would not extend the doctrine of indisputable citizenship to a corporation originally created in one State, and afterwards adopted as a domestic corporation in another State, so as to make such adopted corporation a citizen also of the second State."

In Walters *vs.* C., B. & Q. R. R., 104 Fed. Rep., 377, the statute of Nebraska cited above was construed by Judge Munger. He decided that under this statute a foreign railroad company became a corporation of Nebraska so far as to render it subject to State regulation, but that it did not thereby change its citizenship for the purpose of jurisdiction of the Federal Courts. The point was presented upon a motion to remand, the case having been renewed upon petition to the U. S. Circuit Court.

The Court thus lays down the following rule as to the citizenship of corporations:

"The rule deducible from the decisions of the Supreme Court in the two cases referred to is, that a corporation, as such, has no citizenship; that the citizenship of the incorporators determines the jurisdiction of the Federal Court; that the citizenship of the incorporators is conclusively presumed to be that of the State in which the corporation was first created; that while a corporation organized by the laws of one State may become a domestic corporation of another State, the laws of the two States permitting, yet the citizenship of the incorporators remains that of the State in which corporation was first created."

In passing upon the effect of the Tennessee statute, which requires every foreign corporation to file a copy of its charter, etc., and that "when a corporation complies with the provisions of this act it shall then be to all intents and purposes a domestic

corporation," etc., Judge Clark, in Markwood *vs.* Southern Railway, 65 Fed. R., 817, says: "A mere declaration in the title or body of the act is not sufficient to make a foreign corporation also a domestic one, nor can the use of mere general terms do so. The efficient and operative terms of the act must be sufficient in force and effect to accomplish the result. It requires more than a formal, general statement. Taking these acts together, and looking at them as a whole, I think the purpose and effect were to subject these corporations to the jurisdiction and process of the State Courts, as domestic ones, to bring them within the power of taxation, and that there was no purpose beyond this, except the main purpose, which the act, in section 7, declares for itself. If the purpose was to make these companies corporations of this State, I think the legislation falls short of giving effect to such purpose. Any general or formal terms and phrases in the act are limited and restrained by specific terms in the same section, and by the general effect and purpose of the acts taken as a whole, and this rule applies particularly to section 3 of the original and section 4 of the amendatory act. No reason can be assigned for an intention by the General Assembly to do more than this, unless it was to defeat jurisdiction of the United States Courts, and this would be to impute to the acts a purpose which would render them invalid if expressed. Southern Pacific Co. *vs.* Denton, 146 U. S., 202; Barron *vs.* Burnside, 121 U. S., 186."

The plaintiff in error does not think it necessary to support well considered cases in this Court by further citation of authorities. The case of Debnam *vs.* Telephone Co., 126 N. C., 831, upon which all the North Carolina cases upon this subject are based, rests solely upon a construction of the case of M. & C. R. R. *vs.* Alabama, 107 U. S., 581, *supra*, which is absolutely in the face of the James case and the Louisville Trust Co. case commented upon above. The express language of these two cases, relied upon and quoted in the briefs of counsel, is nowhere alluded to in any of these opinions, but brief citations from other parts of the opinions are given instead. It has become

absolutely necessary, therefore, to ask the interpretation of this Court to preserve the paramount authority of the Constitution and laws of the United States.

It is not necessary to quote the contemporary language of the members of the Legislature and the North Carolina press to demonstrate the purpose and intent of this legislation. It is so clear that "he may run that readeth it." The lawyer who asserts and maintains the right of a foreign corporation to remove a case to the Courts of the United States will frequently meet with attack in the press, and occasionally may expect criticism from other sources. It is of an importance far in excess of the amount involved in this litigation, that the true spheres of State and Federal jurisdiction shall be again mapped out and authoritatively declared.

F. H. BUSBEE,
CHARLES PRICE,
Counsel for Plaintiff in Error.

FILED
APR 4 1903

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 252.

SOUTHERN RAILWAY CO., PLAINTIFF IN ERROR,

vs.

JOHN H. ALLISON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

BRIEF OF JOHN H. ALLISON.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 232.

SOUTHERN RAILWAY CO., PLAINTIFF IN ERROR,

vs.

JOHN H. ALLISON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

BRIEF OF JOHN H. ALLISON.

FACTS.

This was an action brought in the Superior Court of McDowell County, North Carolina, in which it was sought to recover damages amounting to $6,000.00, alleged to have been sustained by the plaintiff below by reason of personal injuries caused by the negligence of the Southern Railway Company.

There was presented to the Superior Court of McDowell County in due form an order of the Circuit Court of the United States removing the case to that Court for trial upon the ground of diverse citizenship and local prejudice. Accompanying the order of removal was a solemn admission of counsel made in open Court to the effect that the Southern Railway Company had complied with the Act of the Legislature of North Carolina, Chapter 62 of the Acts of 1899. (See page 14 of the Record). The Superior Court of Mc-

Dowell County thereupon held that the Southern Railway Company was a domestic corporation chartered under the laws of North Carolina, and that, as the plaintiff was admitted to be a citizen of that state, the State Court had jurisdiction to try the case, and refused to surrender its jurisdiction. The Southern Railway Company, the defendant, excepted to this ruling. There was a trial and a verdict for the plaintiff below for $2,000.00, from which the Southern Railway Company appealed to the Supreme Court of North Carolina. The Supreme Court of that State affirmed the ruling of the Court below as appears from the opinion of Mr. Justice Montgomery, on page 16 of the printed Record, and held with the Superior Court of McDo vell County that, upon the face of the Record and admission appearing in the case on appeal, the Southern Railway Company was at the time of its application for removal, and still was a domestic corporation within the State of North Carolina, and subject to be sued in the State Courts as any citizen of that state. This case is here upon a Writ of Error to the Supreme Court of North Carolina sued out by the Southern Railway Company to have reviewed this ruling of that Court.

Chapter 62 of the Acts of 1899, with the terms of which plaintiff in error admitted it had complied, is as set out on page 2 of Brief of Plaintiff in Error.

ARGUMENT.

When the order for removal was filed in the State Court, and the admission above referred to was made, there was no question of fact for the Court to pass on in deciding whether the State Court should retain jurisdiction of, and try the case. The only question presented was as to whether the plaintiff in error was a domestic corporation, and this was a question of law. When this is so it is the duty of the State Court to pass on the question and retain jurisdiction.

The plaintiff in error submits on page five of its Brief that there are two questions presented:

(1.) Has the State Court the right to pass upon the ques-

tion, whether a corporation which has been adjudged by the United States Court to be a foreign corporation, in a proceeding to remove to the United States Court on the ground of prejudice and local influence, is a domestic corporation, or is the finding by the United States Court conclusive upon the State Court?

(2.) Has a corporation, which is organized under the laws of some other State than North Carolina, and which has complied with the terms of the domestication act of North Carolina, the right to remove a case to the U. S. Circuit Court?

The statement of the first question by the Southern Railway Company, and the argument thereon, ignores the formal admission it made that it had complied with the requirement of the Statute above quoted. (See page 14 of the printed Record.)

This was a voluntary admission made for the purpose of removing any question of fact, and to present a naked question of law. This was done and the Court ruled on it as such. The plaintiff in error cannot, therefore, contend that there was any dispute as to the facts. How could there be a dispute as to the facts when it agreed what the facts were?

The plaintiff in error does not object to a decision of this case now, on its merits. (See page 9 of its Brief).

The second question stated by the plaintiff in error is substantially the real question presented to this Court.

It has been thoroughly considered and decided by the Supreme Court of North Carolina in the following cases:

Debnam vs. Telephone Company, 126 N. C., 831.
Layden vs. Knights of Pythias, 128 N. C., 546.
Allison vs. Southern Railway Co., 129 N. C., 336.

The plaintiff in error presents the question in this form:

"Has a corporation, which is organized under the laws of some other state than North Carolina, and which has complied with the terms of the domestication act of North Carolina, the right to remove a case to the U. S. Circuit Court?"

The answer to this question, in this case, depends on whether the Southern Railway Company by compliance with the Act of 1899, above quoted, was chartered as a North Carolina Corporation, or was licensed as a foreign corporation to do business in the State of North Carolina.

This Court has said, in Martin vs. B. & O. R. R., 151 U. S. on page 677: "A railroad corporation, created by the laws of one state, may carry on business in another, either by virtue of being created a corporation by the laws of the latter state also, as in

Railroad Co. vs. Vance, 96 U. S., 450.
Memphis & Char. R. R. vs. Alabam, 107 U. S., 581.
Clark vs. Barnard, 108 U. S., 436.
Stone vs. Tannars Co., 116 U. S., 307.
Graham vs. Boston Har. & Erie R. R., 118 U. S., 161.

Or by virtue of a license, permission, or authority, granted by the laws of the latter state, to act in the state under its charter from the former state. (Citing cases.) In the first alternative, it cannot remove into the Circuit Court of the United States, a suit brought against it in a Court of the latter state, by a citizen of the state, because it is a citizen of the same state with him. Memphis & Char. R. R. vs. Alabama above cited."

Whether the Southern Railway Company had the right to remove into the Circuit Court of the United States this action brought against it by a citizen of North Carolina in a Court of that State, therefore, depends upon the question whether this Company was a corporation created by the laws of Virginia only, or by the laws of North Carolina also. This is the language of the inquiry, with the names of the States and Railroad Company substituted, as stated by this Court in Martin vs. R. R. near bottom of page 677 of 151 U. S.

After reviewing in that case, the statutes and decisions of Virginia and West Virginia upon this point, this Court concludes, at top of page 684:

"There does not appear, therefore, to be such a settled course of adjudications in the Courts of West Virginia that the Baltimore & Ohio Railroad Company has been made by the Statutes of Virginia, a corporation of that State and of the State of West Virginia, as should induce this Court, when the question arises under an act of Congress defining the jurisdiction of the Courts of the United States, to surrender its own opinion and to reverse the conclusion at which it deliberately arrived in Railroad Company vs. Harris, and which it has repeatedly approved." The conclusion to which the Court referred and from which it declined to recede was that the Baltimore & Ohio Railroad Co. was a corporation of Maryland, licensed and not chartered, to do business in Virginia. If it had been decided by the Supreme Court of West Virginia that the Baltimore & Ohio Railroad Company had been chartered in Virginia, the clear intimation is that this Court would have followed its decision.

The decisions of the Supreme Court of North Carolina are uniform to the effect that a compliance with the act of 1899, chapter 62, by the plaintiff in error, or a like corporation, charters it in North Carolina, as distinguished from licensing a foreign corporation to do business therein.

The Supreme Court of North Carolina has said in this case, as appears from 129th N. C., at page 337, and also on page 16 of the printed Record, "The reason assigned for His Honor's refusal to dismiss this action or to stay proceedings in the State Court was that the defendant had complied with the terms of the act of the Legislature of the State of North Carolina, chapter 62 of the Acts of 1899, and thereby became a corporation of the State. The ruling of His Honor is sustained by the cases of Debnam vs. Telephone Co., 126 N. C., 831, and Layden vs. Knights of Pythias, 128 N. C., 546."

In Debnam vs. Telephone Company, 126 N. C., page 841, the Supreme Court of North Carolina has decided as follows: "Construing the Acts of February 10th, 1899, now under consideration, as a North Carolina Statute, it is clear to us that the legislative intent was, not to grant a mere license under

which foreign corporations might do business in this State, but to require all such corporations to become domestic corporations either by re-enactment or adoption. Whatever the process may be called, the intent of the Act, as well as its legal effect, was to make all corporations complying with its conditions domestic corporations of the State of North Carolina. *Its effect was to charter and not to license.*" Further, the Court says: "Whatever may be the wording of the Act, its effect as well as its legal intent, is to create a domestic corporation out of the stockholders of the foreign corporation."

There are established by these authorities two propositions:

1st. That the Southern Railway Company is a domestic corporation.

2d. That being such corporation it was not entitled to have the case removed to the Circuit Court of the United States.

In the case of Memphis & Char. R. R. Co. vs. Alabama, 107 U. S., on page 584, the Court reviews the Statutes of the State of Alabama in considering whether a Tennessee corporation is licensed to do business in the State of Alabama, or whether there is a chartering of the corporation in the latter State, and concluded that it was the manifest understanding and intention of the legislature of Alabama, that the Acts done by the corporation in compliance with the Alabama Statute amounted to re-chartering in that State. The corporation was held not to be entitled to a removal of the case against it to the United States Circuit Court. The plaintiff in error, in its brief, reviews some of the cases it relies on to sustain its position.

Its quotations from the opinion of the Supreme Court of the United States in the cases of St. L. & S. F. Ry. Co. vs. James, 161 U. S., 545, and Louisville N. A. & C. R. R. vs. Louisville Trust Company, 174 U. S., 552, its analysis and treatment of these cases, and conclusion that they are absolutely in the face of the North Carolina case of Debnam vs. Telephone Co., 126 N. C., 831, and M. & C. R. R. vs. Alabama, 107 U. S., 581, is all done by ignoring the most patent distinctions between two classes of cases and by failing to observe the real

point decided in the cases in the 161 and 174 U. S. In Debnam vs. Telephone Co., 126 N. C., Layden vs. Knights of Pythias, 128 N. C., Allison vs. R. R. 129 N. C., Memphis & Char. R. R. vs. Alabama 107 U. S., Martin vs. B. & O. R. R. 151 U. S., and that line of cases, many of which are cited in the last named case, the question was as it is here: when a corporation is chartered in one state and afterwards is chartered in another, and is sued in the State Courts of the last state in which it is chartered, by a citizen of that state, can it remove the cause to the United States Courts?

There is no decision of the Supreme Court of the United States answering this proposition in the negative. It is held in some cases that they should be removed because the Company was not re-chartered, but merely licensed to do business in the second state.

In St. L. & S. F. Ry. Co. vs. James, 161 U. S., Louisville, N. A. & C. R. R. vs. Louisville Trust Co., 174 U. S., and that line of cases the question was: If a corporation is chartered in one state, and afterwards is chartered in another state, which state is it a citizen of for purposes of jurisdiction *when it sues or is sued in the United States Courts?*

The answer to that question in the cases relied on by plaintiff in error was, that the corporation is a citizen of the state which first chartered it.

The distinction between the two lines of cases, and the fact that the plaintiff in error entirely misconceives and overlooks the point decided in the cases relied on by it is nowhere more clearly made to appear than in the two cases cited by it from the 161 and 174 U. S.

In the first of these cases Mrs. James, who was a citizen of Monett, Missouri, brought suit in the Circuit Court of the United States for the Western District of Arkansas against the St. Louis & San Francisco Ry. Company for negligently causing the death of her husband at Monett, Missouri. The railway company was first chartered by the State of Missouri in 1876. It was contended by Mrs. James that it was afterwards also chartered by the State of Arkansas, and that she

being a citizen of Missouri, and the railway company, a corporation of Arkansas, she could bring her action in the United States Court for the latter state. Mr. Justice Shiras, delivering the opinion of the Court, says, on pages 559 and 560 of the 161 U. S. Supreme Court Reports: "Memphis & C. R. R. Company vs. Alabama was where an action had been brought by the State of Alabama for the use of a county of that state, *in a Court of that state*, [Italics mine] against a railroad corporation whose road passed through that state and county, to recover the amount of a county tax assessed upon its property, and the case was removed into the Circuit Court of the United States for the Western District of Alabama, and upon motion the cause was remanded to the State Court upon the ground that the defendant, although incorporated in Tennessee also was a corporation of the State of Alabama. On error the judgment of the Court below was affirmed, and the Court, per Mr. Justice Gray, said: 'The defendant being a Corporation of the state of Alabama has no existence in this state as a legal entity or person, except under and by force of its incorporation by this state; and, although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the Courts of the United States.'" After reviewing many other cases Mr. Justice Shiras sums up the law of the case under consideration on page 562 to be this: "There is an indisputable legal presumption that a state corporation, *when sued or suing in a Circuit Court of the United States* [Italics mine] is composed of citizens of the state which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal Courts in controversies between citizens of different states."

"It is competent for a railroad corporation organized under the laws of one state, when authorized so to do by the consent of the state which created it, to accept authority from another state to extend its railroad into such state, and con-

trol, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state. Such legislation on the part of two or more states is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreement or compacts between states. *Such corporations may be treated by such of the states whose legislative grants they accept as domestic corporations.*" [Italics mine.] In the other of these cases the plaintiff Louisville N. A. & Chicago Ry. Co., was originally chartered in Indiana, in January, 1873, and the defendants were corporations of Kentucky. The plaintiff brought suit against the defendants in the United States Court for Kentucky. The defendants entered, among other pleas, a plea to the jurisdiction, asserting that the plaintiff had been chartered in Kentucky in 1880, and thereby became a citizen of that state.

The Supreme Court upon a writ of error sustained the jurisdiction of the United States Court, Mr. Justice Gray delivering the opinion. He says, on page 562: "This Court has often recognized that a corporation of one state may be made a corporation of another state by the legislature of that state, in regard to property and acts within its territorial jurisdiction.

> Ohio & Miss. R. R. Co. vs. Wheeler, 1 Black, 286–297.
> B. & O. R. Co. vs. Harris, 12 Wall, 65–82.
> Chi. & N.W. R. R. Co. vs. W. Litton, 13 Wall, 270–283.
> I. & St. L. R. Co. vs. Vance, 96 U. S., 450–457.
> **Memphis & Char. Ry. Co. vs. Alabama,** 107 U. S. 581.
> Clark vs. Banard, 108 U. S., 436–451.
> Stone vs. F. Loan & Trust Co., 116 U. S., 581.
> Graham vs. B. H. & E. R. R. Co. 118 U. S., 161–169.
> Martin vs. B. & O. R. R. Co., 151 U. S., 673–677."

And further on page 563:

"But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this

Court to be required for the disposition of this case, either as to the jurisdiction or as to the merits. As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the State of Indiana, even if it was afterwards created a corporation of the State of Kentucky also, it was and remained, *for the purposes of the jurisdiction of the Courts of the United States* [Italics mine] a citizen of Indiana, the State by which it was originally created."

Both of these cases cite with approval the case of Memphis & C. R. R. Co. vs. Alabama, 107 U. S., 581, and the latter case in the 174, cites the case of Martin vs. B. & O. R. R. Co., 151 U. S., and also thoroughly considers the case in the 161 U. S. The plaintiff in error is, therefore, wide of the mark when it asserts in its brief that the North Carolina cases are wrong because based on the case in the 107 U. S., and that that last mentioned case is in the face of the cases in the 161 and 174 U. S.

To sum up the law applicable to this case and the distinction between the two lines of cases, they are these: A railroad may be a corporation of two or more states. The question of whether it is chartered as a domestic corporation, or licensed to do business as a foreign corporation in any given state depends on the language of the act of the Legislature and the decisions of the Courts of that state from which the purposes and intent of the state are to be gathered. When a corporation is chartered in a state, after having been first chartered in another state, and is sued by, or sues, a citizen of the state in which it was last chartered, in the State Courts of that state, the jurisdiction of the State Courts will not be denied either by the State or Federal Courts.

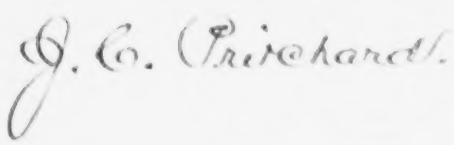
Debnam vs. Telephone Co., 126, N. C., 831.
M. & C. R. R. Co., vs. Ala., 107 U. S., 581.

If such corporation sues, or is sued by a citizen of the second state in which it is chartered in the United States Courts the jurisdiction of the United States Courts will be

sustained upon the ground that in the Federal Courts the corporation is domestic in the state where its original incorporators are citizens, and it will be conclusively presumed, as a matter of law, that they are citizens of the state originally chartering it. The James case in 161 U. S. and the New Albany Company Case, in 174 U. S., above cited.

Respectfully submitted,

E. J. JUSTICE,
Of Counsel for Defendant in Error.



Supreme Court of the United States.

No. 232.—October Term, 1902.

The Southern Railway Company, Plaintiff in Errror, *vs.* John H. Allison.	In error to the Supreme Court of the State of North Carolina.

[May 18, 1903.]

The Supreme Court of the State of North Carolina affirmed a judgment against the railway company, which was entered on a verdict of a jury upon a trial in the State court, and the railway company has brought the case here by writ of error.

The plaintiff below brought his action in the State court against the railway company to recover damages suffered by reason of the alleged negligence of the defendant. The defendant answered, and averred that it was a corporation created and organized under the laws of the State of Virginia; it denied the various allegations of the complaint as to its negligence and as to the damages suffered by the plaintiff, and also set up as a defense plaintiff's contributory negligence. After answer and under the provisions of the second section of the act of Congress, chapter 866, approved August 13, 1888, (25 Stat. 433,) the defendant, alleging that it was a corporation created under the laws of Virginia, submitted a petition to the United States Circuit Court in North Carolina, for the removal of the case from the State to the United States court, and the ground for removal, as stated in the petition, was because of "prejudice or local influence" to such an extent that it would "not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause." The petition was supported by an affidavit that set up facts from which the court might find that defendant could not obtain justice in the State court.

The Circuit Court decided that the proof submitted to it was sufficient; that defendant was a citizen of Virginia, and that it could not, on account of local prejudice and influence, obtain a fair trial in the State court, and it, therefore, ordered the removal of the cause to the United States Circuit Court for the Western District of North Carolina. The court also ordered that its clerk should certify to the State court the order of removal, "together with copies of the petition, bond and affidavit, to the end that the State court may be advised of the action of this court and of its order of

removal, and to the further end that the said State court may proceed no further with the said suit or action, and to the end also that the said State court may direct the clerk of the Superior Court of the county of McDowell to make a full and complete transcript of the record of said action and to certify the same to this court for trial."

Upon the filing of this order in the State court that court declined to grant the motion to surrender jurisdiction, holding that the case could not be legally removed to the Circuit Court of the United States, and it made the following order:

"In this case it appears to the court that the Circuit Court of the United States has caused an order for the removal of the case to the Circuit Court of the United States, upon petition setting forth that the defendant is a non-resident of the State of North Carolina; and it further appearing to the court, by the admission of defendant, through its counsel, that the defendant has complied with the terms of the act of the legislature of the State of North Carolina, being chapter 62 of the acts of the general assembly of North Carolina at its session of 1899: It is thereupon considered by the court that the defendant is a corporation of this State by virtue of said act, and that it is not entitled to remove this cause to the Federal court. It is further considered by the court that the courts of the State of North Carolina have jurisdiction of this cause, and this court declines to surrender jurisdiction thereof. It is ordered by the court that a copy of this order be sent to the clerk of said Circuit Court of the United States by the clerk of this court."

The act of the legislature of North Carolina, referred to in the foregoing order, is set forth in full in the margin.*

---

*(Chapter 62, Public Acts of 1899.)

The General Assembly of North Carolina do enact:

SEC. 1. That every telegraph, telephone, express, insurance, steamboat and railroad company incorporated, created and organized under and by virtue of the laws of any State or government other than that of North Carolina, desiring to own property or to carry on business, or to exercise any corporate franchise whatsoever in this State, shall become a domestic corporation of the State of North Carolina by filing in the office of the Secretary of State a copy of its charter, duly authenticated in the manner directed by law for the authentication of statutes of the State or country under the laws of which such company or corporation is chartered and organized, and a copy of its by-laws duly authenticated by the oath of its secretary. Such corporation shall pay therefor to the Secretary of State, to be turned over by him into the State treasury, such fees as are or may be required by law.

SEC. 2. That if any such charter or by-laws, or any part thereof, filed in the office of the Secretary of State shall be in contravention or violation of the laws of this State, such charter or by-laws, or such part thereof as are in conflict with the laws of this State, shall be null and void in this State.

SEC. 3. That when any such corporation shall have complied with the provisions of this act above set out it shall thereupon immediately become a corporation of this State, and shall enjoy the rights and privileges and be subject to the liability

It was admitted that defendant had complied with the terms of the act before the cause of action set out in the complaint of plaintiff had accrued.

When the case was thereafter called for trial in the State court, a motion was again made to dismiss the same from that court because of the removal to the United States Circuit Court. The motion was again denied, and an exception taken by the defendant. The case was then tried in the State court and resulted in a verdict for the plaintiff, upon which judgment was entered, and exception taken to the verdict and to the entry of judgment. Defendant appealed from the judgment to the Supreme Court of the State of North Carolina and assigned as error, among other things, the refusal of the trial court to recognize the removal, and its trial of the cause after it had been legally removed to the Federal court. The Supreme Court of North Carolina affirmed the judgment, (129 N. C. 336,) and decided against the right claimed by defendant to a removal of the cause under the statute of the United States above referred to.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

The State court refused to recognize the validity of the order of removal of this case to the Federal court solely because of the State statute, and because of the admitted compliance of defendant with its provisions. It held that by complying with the statute the defendant became a citizen of North Carolina, so far at least as to prevent it from applying for removal as a citizen of another State. We, therefore, assume the sufficiency of the

of corporations of this State the same as if such corporation had been originally created by the laws of this State. It may sue and be sued in all the courts in this State as fully as if such corporation were originally created under the laws of the State of North Carolina.

SEC. 4. That on and after the first day of June, eighteen hundred and ninety-nine, it shall be unlawful for any such corporation to do business or attempt to do business in this State without having fully complied with the requirements of this act.

SEC. 5. Any such corporation violating any of the provisions of this act shall forfeit to the State of North Carolina a penalty of two hundred dollars for each and every day after the first day of June, eighteen hundred and ninety-nine, on which such corporation shall have continued to operate and do business without having complied with the requirements of this act. Such penalty shall be recovered by the treasurer of the State for the benefit of the State of North Carolina, and it shall be his duty to sue for such forfeitures in the Superior Court of Wake County as the same accrue.

SEC. 6. No telegraph, telephone, express, insurance, steamboat or railroad company, which is a foreign corporation of another State doing business in North Carolina, shall be allowed to sue in the courts of North Carolina on or after June first, eighteen hundred and ninety-nine, until such foreign corporation has become

facts to warrant the decision of the Circuit Court of the United States removing the case to that court, provided the defendant company was a citizen of Virginia and did not become a citizen of North Carolina by virtue of its compliance with the State statute.

The ruling of the State court, by which it proceeded to judgment in the case notwithstanding the order of removal to the Federal court, is reviewable here under section 709, Revised Statutes. (*Stone* v. *South Carolina*, 117 U. S. 430; *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 Id. 556.)

Two propositions were argued at the bar: (1) Whether the State court had the right to pass upon the question of the validity of the order of the Circuit Court of the United States removing the case to that court? (2) Did the defendant company, which was originally incorporated in the State of Virginia, have the right as a citizen of Virginia to remove the case into the Federal court, notwithstanding the defendant company had complied with the statute of North Carolina, which declared that upon doing the things therein mentioned the defendant became a domestic corporation of North Carolina?

In the view we take of this case it is unnecessary to dwell upon the first of these questions. We, therefore, address ourselves to the second.

The statute of North Carolina provides in substance that a railroad company incorporated under the laws of any State or government, other than

---

a domestic corporation, either by a special act of the legislature, or under the provisions of this act.

SEC. 7. No such foreign corporation, mentioned in the preceding section of this act, shall be allowed to enter into a contract in the State of North Carolina on or after the first day of June, eighteen hundred and ninety-nine, nor shall any such contract heretofore or hereafter made, or attempted to be made and entered into by such corporation in the State of North Carolina, be enforcible by such corporation unless such corporation shall, on or before the first day of June, eighteen hundred and ninety-nine, become a domestic corporation under and by virtue of the laws of North Carolina.

SEC. 8. Any such corporation violating the provisions of this act by doing any business in this State without first becoming a domestic corporation in the manner prescribed by law shall, in addition to the penalty prescribed in section 5 of this act, forfeit a penalty of five hundred dollars for each day any such business shall be done by it in the State of North Carolina on or after the first day of June, eighteen hundred and ninety-nine. The amount so forfeited under the provisions of this section shall be recovered by the treasurer of North Carolina, and it shall be the duty of said State treasurer to institute suit for same in the Superior Court of Wake County: *Provided*, The business contemplated in this section of this act does not embrace such business as is strictly the business of interstate commerce.

SEC. 9. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

SEC. 10. That this act shall be in force from and after its ratification.

Ratified the 10th day of February, A. D. 1899.

North Carolina, which desires to own property or carry on business, or to exercise any corporate franchises within that State, shall become a domestic corporation of the State of North Carolina "by filing in the office of the Secretary of State a copy of its charter, duly authenticated in the manner directed by law for the authentication of statutes of the State or country under the laws of which such company or corporation is chartered or organized, and a copy of its by-laws duly authenticated by the oath of its secretary." Section 3 of the act provides:

"That when any such corporation shall have complied with the provisions of this act (above set out) it shall thereupon immediately become a corporation of this State . . . shall enjoy the rights and privileges and be subject to the liability of corporations of this State the same as if such corporation had been originally created by the laws of this State. It may sue and be sued in all courts of this State and shall be subject to the jurisdiction of the courts of this State as fully as if such corporation were originally created under the laws of the State of North Carolina."

It is further provided by section 4 that it shall be unlawful for such foreign corporation to do business or attempt to do business in North Carolina after the first day of June, 1899, without having fully complied with the requirements of the act. It is admitted that the company did comply with the provisions of the act in relation to filing its charter, by-laws, &c., with the Secretary of State.

It early became material to inquire into the nature of the status of corporations with regard to the jurisdiction of the Federal courts under the Constitution and laws of the United States. A recent statement of the law on that subject is contained in the case of *St. Louis & San Francisco Railway Company* v. *James*, (161 U. S. 545.) It was said by Mr. Justice Shiras, in delivering the opinion of the court in that case, that after considerable contention in the courts, it was finally determined by this court that the citizenship of a corporation was that of the State originally creating it, and that it was a presumption of law that the members of the corporation were citizens of the same State.

The facts upon which the decision of the court in that case was based, so far as important to be here observed, were these: The St. Louis and San Francisco Railway Company was a corporation originally created under the laws of the State of Missouri, and it operated a railroad from Monett in the State of Missouri to the southern border of that State. Subsequently, and under provisions of the laws of Arkansas, it entered that State for the purpose of operating its road therein from the southern boundary of the State of Missouri to Fort Smith in the State of Arkansas: the portion of the railroad in Arkansas was operated by the leasing of a railroad already or partly built in that State. The State of Arkansas had provided by its legislation that before any railroad corporation of any

other State or Territory should be permitted to avail itself of the benefits of the act allowing the purchasing or leasing of any road within that State, the foreign corporation should "file with the Secretary of State of this State a certified copy of its articles of incorporation, if incorporated under a general law of such State or Territory, or a certified copy of the statute laws of such State or Territory incorporating such company, where the charter of such railroad corporation was granted by special statute of such State; and upon the filing of such articles of incorporation or such charter, with a map and profile of the proposed line, and paying the fees prescribed by law for railroad charters, such railroad company shall, to all intents and purposes, become a railroad corporation of this State, subject to all of the laws of the State now in force or hereafter enacted, the same as if formally incorporated in this State, anything in its articles of incorporation or charter to the contrary notwithstanding, and such acts on the part of such corporation shall be conclusive evidence of the intent of such corporation to create and become a domestic corporation: *And provided further*, That every railroad corporation of any other State, which has heretofore leased or purchased any railroad in this State, shall, within sixty days from the passage of this act, file a duly certified copy of its articles of incorporation or charter with the Secretary of State of this State, and shall, thereupon, become a corporation of this State, anything in its articles of incorporation or charter to the contrary notwithstanding, and in all suits or proceedings instituted against any such corporation process may be served upon the agent or agents of such corporation or corporations in this State, in the same manner that process is authorized by law to be served upon the agents of railroad corporations in this State organized and existing under the laws of this State."

The railroad company, pursuant to that act, filed with the Secretary of State of the State of Arkansas a duly certified copy of its articles of incorporation under the laws of Missouri. After this had been done and while the company was operating its railroad from Monett, Mo., to Fort Smith, Ark., one Etta James brought an action in the Circuit Court of the United States for the Western District of Arkansas against the company for negligence in maintaining a switch track at Monett, in Barry County, Mo., so near its tracks that the husband of plaintiff was struck and killed by it on July 3, 1889, while employed as a fireman on one of the company's engines. The plaintiff was the widow and sole heir at law of her husband, and resided at Monett, and was a citizen of the State of Missouri. She recovered a verdict in the United States Circuit Court in Arkansas, and the cause was taken to the Circuit Court of Appeals for the Eighth Circuit by the railroad company, which claimed that the Circuit Court of Arkansas had no jurisdiction, because the railroad company was a citizen of Missouri and the plaintiff was a citizen of the same State. That court,

desiring instructions from the Supreme Court of the United States before deciding the case, propounded the following questions:

"1. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis and San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the Secretary of State of Arkansas, and continuing to operate its railroad through that State, become a corporation and citizen of the State of Arkansas?

"2d. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis and San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the Secretary of State of Arkansas, and continuing to operate its railroad through that State, become a citizen of the State of Arkansas, so as to give the Circuit Court of the United States for the Western District of Arkansas jurisdiction of this action, in which the defendant in error was and is a citizen of the State of Missouri?

"3d. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis and San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the Secretary of State of Arkansas, and continuing to operate its railroad through that State, become a citizen of the State of Arkansas, so as to give the Circuit Court of the United States for the Western District of Arkansas jurisdiction of this action, in which defendant in error was and is a resident and citizen of the State of Missouri, and the cause of action accrued in the State of Missouri, and arose from an accident that resulted from the operation of the railroad of the company in that State?

"4th. In view of the facts hereinbefore set forth, did the Circuit Court of the United States for the Western District of Arkansas have jurisdiction of this action?"

After a full examination of the prior cases Mr. Justice Shiras, speaking for the court, answered the second question in the negative, observing that such answer rendered it unnecessary to answer the other questions.

Here was a corporation originally incorporated in the State of Missouri going into the State of Arkansas and operating a railroad in that State by leasing a portion of it therein and complying with a statute which provided that, upon filing a certified copy of its articles of incorporation with the Secretary of State of Arkansas, it should be regarded as formally incorporated in that State, and it should thereby become a domestic corporation, and yet it was held that defendant could not be sued by a citizen of Missouri in the Federal court in the State of Arkansas; that although to some extent and for some purposes it might be regarded as a corporation of Arkansas, it was for purposes of jurisdiction in the Federal courts to be regarded as a corporation of the State of Missouri.

The case, it will be seen, was not decided upon the ground that the cause of action had arisen in the State of Missouri. It was admitted that the cause of action was transitory, but the broad question was decided that

the company was a corporation of Missouri and a citizen of that State, and could not be sued by another citizen of that State in the Federal courts of Arkansas.

It is stated in the opinion:

"The presumption that a corporation is composed of citizens of the State which created it accompanies such corporation when it does business in another State, and it may sue or be sued in the Federal courts in such other State as a citizen of the State of its original creation.

"We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one State, indisputably taken, for the purpose of Federal jurisdiction, to be composed of citizens of such State, is authorized by the law of another State to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second State, in such a sense as to confer jurisdiction on the Federal courts at the suit of a citizen of the State of its original creation.

"We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that State corporations were composed of citizens of the State which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it."

In *Louisville &c. Railway Co.* v. *Louisville Trust Co.*, (174 U. S. 552,) a question arose as to whether the railway company was a corporation of Kentucky as well as of the State where it was originally created. The exigencies of the case did not require a solution of that question, but the *James case* (*supra*) was referred to with approval in the opinion of the court, which was delivered by Mr. Justice Gray. In the course of that opinion, he said (p. 563):

"But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction, or as to the merits. As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the State of Indiana, even if it was afterwards created a corporation of the State of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the State by which it was originally created. It could neither have brought suit as a corporation of both States against a corporation or other citizen of either State, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States."

So it seems that a corporation may be made what is termed a domestic corporation, or in form a domestic corporation, of a State in compliance with the legislation thereof, by filing a copy of its charter and by-laws with the Secretary of State, yet such fact does not affect the character of the origi-

nal corporation. It does not thereby become a citizen of the State in which a copy of its charter is filed, so far as to affect the jurisdiction of the Federal courts upon a question of diverse citizenship.

Considerable stress has been laid, by those holding opposite views, upon the case of *Memphis & Charleston R. R. Co.* v. *Alabama*, (107 U. S. 581.) It was there held that a railroad company, having been made by the statutes of Alabama an Alabama corporation, although having previously been incorporated in Tennessee, could not remove into the Circuit Court of the United States a suit brought against it in Alabama by a citizen of that State. But in that case the company was required by the legislation of Alabama to open books in that State for the subscription of stock in the capital of the corporation, so as to afford the citizens thereof an opportunity to take stock to the amount of a million and a half of dollars of the capital of the company. The Alabama act also provided that the company should, at the first meeting of the stockholders, designate a time when and a place or places in northern Alabama where, for the convenience of the citizens of the State who may be stockholders, an election for directors should be held, notice whereof was to be given in the newspapers, and elections for directors should be held at the same time both in Alabama and in Tennessee.

This court held, that by reason of the particular language used in the act, there was a separate original Alabama corporation formed; that the sections, taken altogether, made it a corporation created as well as controlled by the State of Alabama. It is stated in the opinion, page 584

"The whole act, taken together, manifests the understanding and intention of the legislature of Alabama that the corporation, which was thereby granted a right of way to construct through this State a railroad, with which any railroad company, chartered or to be chartered in this State, should have the right to connect its road, and which was required to construct a branch railroad in this State, to open books for subscriptions of stock to a certain amount in this State, to apply the moneys here subscribed to the construction of the road within this State, and to hold elections in this State, was and should be in law a corporation of the State of Alabama, although having one and the same organization with the corporation of the same name previously established by the legislature of Tennessee."

The difference between the above case and the cases we have already referred to is plain and fundamental, but in any event we regard the *James case*, reaffirmed and approved as it is by that of *Louisville &c. Railroad* v. *Trust Company*, (174 U. S. *supra*,) as decisive of the case before us.

We do not subscribe to the doctrine that if a corporation files its charter in one State, after having been first chartered in another State, and is sued by a citizen of the State in which it filed its charter, in the State courts of that State, the right of removal to the Federal courts will be

denied, while at the same time if such a corporation is sued by a citizen of the State in which it filed its charter, in the United States courts, the jurisdiction of the United States courts will be sustained upon the ground that in the Federal courts the corporation is domestic in the State where it was originally created and where its original incorporators are citizens, and it will be conclusively presumed as a matter of law that they are citizens of the State originally chartering it. If there be jurisdiction in the United States courts in the latter case, on the ground that it is a corporation and citizen of the State in which it was created, that fact gives jurisdiction to the Federal court to remove the case from the State court when the corporation is sued by a citizen of the State in which it filed its charter, because such corporation is a citizen of another State, namely, the State in which it was originally created. The citizenship of the corporation is not changed because of the particular court in which the action is commenced. If it be a citizen of another State in the one case, it is such citizen also in the other, and if the other party to the action be a citizen of a State other than the one which created the corporation the jurisdiction of the Federal courts exists, and the right of the corporation (upon complying with the statute) to remove the case from the State court when it is sued by a citizen of the State where its charter may have been subsequently filed, is granted by the laws of the United States.

We have read with respectful consideration the cases of *Debnam* v. *Southern Bell Telephone & Telegraph Company*, (126 N. C. 831,) and *Layden* v. *Knights of Pythias &c.*, (128 Id. 546,) in which the Supreme Court of North Carolina comes to a different conclusion from that which we have reached in regard to the jurisdiction of the Federal courts in such a case as this, but we cannot concur in the doctrine of the Supreme Court of the State as announced in those cases. We feel bound by the decisions of this court upon that subject.

The Supreme Court of South Carolina has come to the same conclusion that we reach in this case, having altered its holding in *Mathis* v. *Railway Company*, (53 S. C. 257,) after the decision of the *James case*, (161 U. S. *supra*.) See, to that effect, *Wilson* v. *Southern Railway &c.*, (36 S. E. Rep. 701.)

In *Walters* v. *Chicago &c. Railroad Company*, (104 Fed. Rep. 377,) the United States Circuit Court in Nebraska held, in accordance with the principles maintained in the *James case*, that the defendant, although made a domestic corporation of Nebraska, yet having in fact been originally created by the State of Illinois, was a citizen of that State. The motion to remand to the State court was therefore denied.

We are of opinion that the plaintiff in error was not a citizen of the State of North Carolina at the time it was sued by the defendant in error,

so far as regards the jurisdiction of the Federal courts, and that the order of removal made by the Circuit Court of the United States operated to withdraw from the State court the right to hear and determine the case. The judgment of the Supreme Court of North Carolina is, therefore, reversed, and the case remanded to that court for further proceedings not inconsistent with the opinion of this court.

So ordered.

True copy.

Test:

Clerk Supreme Court, U. S.